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CASES ARGUED AND DETERMINED
Massachusetts IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

DECEMBER 1917 — MARCH 1918

HENRY WALTON SWIFT
REPORTER

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. CHARLES AMBROSE De COURCY.

HON. JOHN CRAWFORD CROSBY.

HON. EDWARD PETER PIERCE.

HON. JAMES BERNARD CARROLL.

ATTORNEY GENERAL

HON. HENRY CONVERSE ATTWILL.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

STEPHEN H. CLARK, administrator, *vs.* NEW ENGLAND TELEPHONE
AND TELEGRAPH COMPANY.

Bristol. October 22, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Practice, Civil, Amendment. *Corporation*, Fund maintained for injured employees and their dependents. *Evidence*, Of bad faith.

Under R. L. c. 173, §§ 48, 121, in a case where the evidence was unreported, a trial judge found that an action, on a contract made by a corporation with its employees to indemnify them or their dependents out of a benefit fund established and maintained by the corporation for injuries sustained in the course of their employment or death caused thereby, was for the cause of action for which an action of tort, by the administrator of the estate of a deceased injured employee who was the same person alleged to be his dependent father against his employer for causing the alleged suffering and death of the plaintiff's intestate by reason of the defendant's negligence, was intended to be brought and was the cause of action relied on by the plaintiff when the action of tort was commenced, and it was *held* that this court could not say as matter of law that the finding was impossible and therefore could not say that the allowance by the trial judge of an amendment from such an action of tort into such an action of contract was unwarranted.

In an action of contract by the administrator of the estate of a deceased injured employee, who also is his alleged dependent, against the employer of the plaintiff's intestate upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for

that purpose, it is no defence that the plaintiff brought an action of tort against another corporation for causing the death of the plaintiff's intestate in which he received in settlement and release of the cause of action a certain sum of money, and consequently it is right for the trial judge to deny a motion of the defendant to be allowed to amend its answer by setting up such an alleged defence.

In an action by the administrator of a deceased employee, who also was his alleged dependent, against the employer of the plaintiff's intestate upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, where it appeared that the fund was supplied and kept up entirely by the defendant and was administered at its sole expense and that the plan for the management and administration of the employees' benefit fund provided that the employees' benefit fund committee should consist of five persons, that this committee was composed of the five heads of departments of the defendant and that all of them were the defendant's employees and were fellow employees of the plaintiff's intestate, and that this committee found that the plaintiff was not dependent upon his deceased son, the intestate, the judge instructed the jury in substance that, if this committee made no order for payment to the plaintiff because they found in good faith that he was not dependent upon the earnings of the deceased, the plaintiff could not recover. *Held*, that this instruction was right.

In the same case, upon the question whether there was any evidence of want of good faith on the part of the committee, it appeared that an investigator employed by the defendant visited the plaintiff, as the father of the deceased employee, after the accident and inquired of him respecting his dependency for support upon the earnings of the deceased and that a statement in writing was signed by the plaintiff as such father, which contained no assertion of dependency and which the plaintiff testified at the trial was incorrect in omitting to state his partial dependence upon such earnings, and that the committee relied entirely upon the report of the investigator and did not notify the plaintiff to appear before them or give him any hearing. *Held*, that, although it would have been wiser for the committee to have notified the plaintiff and have given him a hearing before making a decision, their omission to do so was not evidence of bad faith, nor was the complete reliance of the committee on the report of facts made by the investigator evidence of bad faith, there being nothing to indicate that they had any reason to distrust his faithfulness, accuracy or soundness of judgment.

TORT, afterwards amended into an action of contract or tort and later into an action of contract, by the administrator of the estate of Harry W. Clark, late of the town of Fairhaven, the declaration containing before amendment six counts respectively for the alleged suffering and death of the plaintiff's intestate caused by an injury received by the intestate on May 7, 1913, when in the employ of the defendant by reason of negligence of servants of the defendant and defects in its ways, works and machinery and negligence of a superintendent. Writ dated May 6, 1914.

After the defendant had answered, the plaintiff filed a motion for leave to amend his writ by adding after the words, "in an action of tort," the words, "or contract," so that the action would appear therein as "tort or contract," and for leave to amend his declaration by substituting therefor a declaration containing four counts, of which the first was in contract and the remaining counts in tort. The allowance of the amendment, subject to the defendant's exception, is described in the opinion.

Without waiving this exception, the defendant demurred to the substituted declaration, and this demurrer was sustained by *Sanderson, J.*

Thereupon the plaintiff moved to amend his writ and declaration so that they might read, "in an action of contract," and should include only the first count in the substituted declaration, and this motion was allowed by *Sanderson, J.*, the defendant's counsel saying that he did not object to the allowance of the motion.

The substituted declaration in contract was as follows:

"First count: And the plaintiff says that on or about the seventh day of May, 1913, the defendant corporation conducted a telephone business in this Commonwealth; that in the conduct of that business it maintained certain wires strung on poles on Washington Street in Fairhaven, in this county and Commonwealth; that the plaintiff's intestate was an employee of the defendant on said seventh day of May, 1913, and that as such employee it was part of his duty to work about a pole on said Washington Street and to ride on a certain chair suspended from one of the wires strung on said pole; that while the plaintiff's intestate was so employed on said seventh day of May, 1913, he was severely injured by coming in contact with a wire containing electricity which was on said pole, causing him to be thrown to the ground, from which injuries the intestate died the following day; that the defendant established, maintained and agreed with the plaintiff's intestate for a valuable consideration to administer a fund known as the 'Employees' Benefit Fund,' the defendant company undertaking and agreeing to insure its employees, including the plaintiff's intestate, so that in case of death by accident occurring in and due to the performance of work for the company, upon receiving notice thereof, the company was to pay to the dependents of dead employees a sum equal to three years' average wages but not to exceed five thousand

(\$5,000) dollars, and to pay the funeral and other expenses of the deceased, up to one hundred (\$100) dollars; that the intestate left his father dependent upon him for support; that due notice of the death of the intestate and claim for payment under said fund was duly given to the defendant company, but the defendant company refused and still refuses to make any payment under said 'Employees' Benefit Fund'; and the plaintiff says he is the father of the intestate, and the administrator of his estate; and that all conditions and stipulations to be performed by the plaintiff or his intestate were duly performed, or the defendant waived their performance."

To the substituted declaration as amended the defendant, without waiving its exceptions previously filed, demurred. This demurrer was argued before *Dubuque, J.*, who made an order overruling it. The defendant appealed.

The defendant, without waiving its exceptions or its demurrer to the substituted declaration as amended, filed an answer to the substituted declaration as amended. Later the defendant, without waiving its exceptions or its appeal, filed a motion for leave to amend its answer to the substituted declaration as amended, by adding the allegation that the plaintiff had brought an action of tort in the Superior Court against the Union Street Railway Company to recover damages for the injuries and death of his intestate on account of the same accident for which the present action was brought; that in said action against the Union Street Railway Company the plaintiff had recovered judgment; that the plaintiff had received full satisfaction of the aforesaid judgment; that the plaintiff in consideration of the sum of \$1,700 had released the Union Street Railway Company from any liability on account of the injuries to and death of his intestate, and on account of any cause of action arising therefrom, and that by reason of the foregoing the plaintiff had discharged and released the defendant from any liability on account of the injuries to and death of his intestate.

Afterwards this action of contract came on for trial before *Dubuque, J.*, and a jury.

At the beginning of the trial the judge denied the defendant's motion to amend its answer to the plaintiff's substituted declaration "for the reason that the matters therein [in the proposed

amendment] set forth are not a bar to recovery on the substituted declaration as amended, which is an action of contract." The defendant excepted.

The evidence at the trial, so far as material, is described in the opinion. At the close of the evidence the defendant asked the judge to rule that upon the pleadings and all the evidence the plaintiff was not entitled to recover and to order a verdict for the defendant. The judge denied the motion, stating, however, that there was doubt in his mind regarding the correctness of this ruling but that he thought that the better course would be to submit the case to the jury. Accordingly he submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$3,020.59. The defendant alleged exceptions.

J. N. Clark, for the defendant.

C. R. Cummings, (*J. W. Nugent* with him,) for the plaintiff.

Rugg, C. J. This action was begun in tort. The declaration contained several counts founded upon negligence of the defendant at common law and under the employers' liability act seeking to recover damages for the conscious suffering and death of the plaintiff's son. Thereafter he was permitted to amend his writ, so that the action would appear to be either in tort or contract, and to add a count to his declaration, sounding in contract and alleging in substance that the defendant had established and maintained and undertaken to administer an insurance fund for the benefit among others of the plaintiff's intestate, who, while an employee of the defendant, had lost his life by accident in the performance of his duties; and had agreed with him to pay to the plaintiff as his dependent father under the conditions which have arisen, a sum of money, but had refused to do so. The defendant excepted to the allowance of this amendment.

It is provided by R. L. c. 173, § 48, that the court may allow any amendment of form or substance in process or pleading "which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought" and by § 121 that "The cause of action shall be considered to be the same for which the action is brought, if the court finds that it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity

of the cause of action." This is a remedial statute. It has been construed liberally. *Mann v. Brewer*, 7 Allen, 202. *Herlihy v. Little*, 200 Mass. 284. *Upson v. Boston & Maine Railroad*, 211 Mass. 446. *Lowrie v. Castle*, 225 Mass. 37. The power to allow amendments is not unlimited and cases arise where as matter of law a finding of identity of the cause of action is impossible. *Brooks v. Boston & Northern Street Railway*, 211 Mass. 277. *Church v. Boylston & Woodbury Cafe Co.* 218 Mass. 231. Cases may arise, also, where the evidence shows that a finding of identity of the cause of action set out in the proffered amendment, with that intended when the action was instituted, would not be warranted. *Silver v. Jordan*, 139 Mass. 280. The basis in facts upon which this amendment was allowed by the judge in the case at bar is not set out in the record. It does not appear that there was a purpose at the time the action was brought to pursue the defendant in tort with a knowledge of the existence and character of the action in contract. Although it seems a great stretch to suppose such thoughtlessness, forgetfulness or confusion of ideas as would induce one to institute an action of tort based on negligence when the cause of action intended was an action of contract growing out of beneficiary quasi-insurance established by the employer, it is not quite possible in the absence of any report of the evidence to say as matter of law that a finding to that effect is impossible. *Strout v. United Shoe Machinery Co.* 215 Mass. 116. If the ground for the allowance of the amendment was a ruling of law, that is not set forth in the record and hence cannot be reviewed.

The defendant moved to amend its answer by setting up an action of tort by the plaintiff against the Union Street Railway Company for its negligence in causing the death of the plaintiff's intestate and payment to him by that defendant of \$1,700 in settlement and release of the cause of action. While these allegations, if proved, would have barred the action in tort against this defendant, set out in several counts in the original declaration, *Brewer v. Casey*, 196 Mass. 384, 389, they constitute no defence to the action in contract upon which the case was tried. The denial of this motion was not error.

The case went to trial upon the count in contract alone. The plaintiff's intestate was an employee of the defendant and received injuries in the course of his work, from which he died without con-

scious suffering. The evidence tended to show that the defendant had undertaken to establish, maintain and administer all at its own expense a fund known as the Employees' Benefit Fund, for the relief among others of dependent relatives of employees meeting death by accident occurring in and due to the performance of their work. The plan was comprehensive in scope, with many provisions, among which were the following:

"1. There shall be a Committee of five (5) appointed by the Board to serve during its pleasure, which Committee shall be charged with the administration of the plan and the Fund hereby established. This Committee shall be called The Employees' Benefit Fund Committee and shall be empowered to employ a Secretary and such other assistants as may be required in the administration of the Fund."

"3. The word 'Committee' shall mean the persons appointed by the Board to administer the Employees' Benefit Fund in accordance with approved Regulations."

"33. Questions of fact arising in the administration of these Regulations shall be determined conclusively for all parties by the Committee."

The "Obligation of the Company" is stated in these words:

"The obligation of the Company is limited:

"First: To safeguarding the sum already appropriated.

"Second: To crediting said sum 4% per annum of the unexpended balance of the Fund.

"Third: To the appointment of a Committee to administer the Fund according to these Regulations.

"Fourth: To making payments out of the Fund upon the order of the Committee.

"Fifth: To adding to the Fund at the end of each fiscal year such amount as will restore it to the original amount, provided that such addition shall in no year exceed 2% of the Company's pay-roll."

These terms fix definitely the liability of the defendant. The obligation to make payments out of the fund was confined to such as were ordered by the committee. In this regard the stipulations of the plan were not unlike those sometimes found in building contracts respecting architects' certificates. *Hebert v. Dewey*, 191 Mass. 403. *Loftus v. Jorjorian*, 194 Mass. 165. *Handy v. Bliss*,

204 Mass. 513. *Hathaway v. Stone*, 215 Mass. 212. *Flint v. Gibson*, 106 Mass. 391. The committee is made the *quasi* arbitrator as to all claims against the fund. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, and cases collected at pages 227 and 228. Moreover, this was a fund supplied and kept up entirely by the defendant and administered at its own expense. The employees made no contribution to it. The case at bar is in this respect quite distinguishable from *Miles v. Schmidt*, 168 Mass. 339, *Bauer v. International Waste Co.* 201 Mass. 197, 202, 203, *Lewis v. Brotherhood Accident Co.* 194 Mass. 1, *White v. Middlesex Railroad*, 135 Mass. 216, *Meacham v. Jamestown, Franklin & Clearfield Railroad*, 211 N. Y. 346, and other like cases, which hold that agreements to submit all disputes arising out of particular contracts to the final decision of a tribunal selected by the parties, are void. While the relation of the defendant to its employees in this respect is contractual, it is one of a peculiar nature. The defendant makes all the contributions to the funds by voluntary action and distributes it according to a stipulated plan mutually accepted by it and the employees in the way of beneficial relief to the latter. So far as that plan is executed in good faith, no sound reason appears why its terms should not govern the rights of the parties.

The committee referred to in the regulations for administering the fund, which considered the claim of the father, the present plaintiff, to be a dependent of his deceased son, was composed of five heads of departments of the defendant, all its employees and fellow employees with the deceased. No contention has been made that the committee was not fairly constituted. It can hardly be said as matter of law that it might not be composed entirely of employees of the company. The fund was established exclusively for the benefit of its employees. To place its administration concerning payments to be made from it wholly in their hands cannot be said as matter of law to have been improper or contrary to public policy. The situation in this regard is remotely analogous to agreements for the performance of work or the furnishing of goods to the satisfaction of one party thereto, contracts which are not illegal and require at most only an honest expression of opinion or judgment. *Brown v. Foster*, 113 Mass. 136. *Fechteler v. Whittemore*, 205 Mass. 6, 10. *Hawkins v. Graham*, 149 Mass. 284, 287. *Farmer v. Golde Clothes Shop, Inc.* 225 Mass. 260, 263. The

methods of investigation of claims and general principles followed by the committee in the performance of their duties must be fair and reasonable. But there is nothing in this record to disclose anything objectionable in this regard. The principles stated and adverted to in *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, are not applicable to the facts here disclosed. Under these circumstances the court rightly instructed the jury in substance that, if the committee made no order for payment to the plaintiff because they found in good faith that he was not dependent upon the earnings of the deceased, there could be no recovery.

It remains to determine whether there was any evidence of want of good faith on the part of the committee, for, if there was not, verdict should have been ordered for the defendant. The facts pertinent in this connection are that an investigator employed by the defendant visited the father of the deceased after the accident and inquired of him respecting his dependency for support upon the earnings of the deceased. A statement was signed by the father, which contained no assertion of dependency upon the earnings of the decedent by the father and which the latter testified at the trial was incorrect in that it omitted to state that he was dependent to a certain extent upon such earnings. It does not appear that the committee had any knowledge or suspicion at the time of making their decision that the plaintiff challenged the accuracy of this statement. Further investigations were made by inquiry of several other persons, who were neighbors, relatives or friends of the plaintiff. The report of the investigator was laid before the committee. Whether there was such dependency or not was a question of fact and its decision, even on the evidence at the trial, rested upon the credibility and reliability of witnesses and their opportunity for and accuracy of observation. But it is no ground for setting aside the finding of the committee merely that they reached honestly a wrong conclusion. There is nothing in the record to show that the committee pursued any different course in examining and passing upon the claim of the plaintiff from that followed by them in other cases.

The only question is, whether the circumstances that the committee relied entirely upon the report of the investigator and did not notify the plaintiff to appear before them and give him a hearing are evidence of bad faith on their part in making an

award. As bearing upon this point it was said in *Palmer v. Clark*, 106 Mass. 373, 389, respecting the duty of a referee or arbitrator agreed on by the parties in the country, "The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed upon may see fit honestly to adopt, or upon such evidence as he may choose to receive." This case has been cited frequently. The words just quoted were made in part the basis of decision in *Hanley v. Aetna Ins. Co.* 215 Mass. 425, 428, 429, to the effect that the referees under the Massachusetts standard form of fire insurance were not required before St. 1910, c. 489, to hear the parties before making an award. A result of this principle is that within reasonable limits as to time a decision already published may be corrected or altered, *Hathaway v. Stone*, 215 Mass. 212, 217, a thing which a jury cannot do after the verdict has been recorded and they have dispersed.

Doubtless it would have been wiser for the committee to have notified the plaintiff and have given him a hearing before making a decision. But in the light of these decisions, it cannot be regarded as evidence of bad faith or dishonesty that they did not do that which they were under no obligation to do in the exercise of good faith. No more is it evidence of bad faith that they relied upon the report of facts made by the investigator. There is nothing to indicate that they had any reason to distrust his faithfulness, accuracy or soundness of judgment. He was bound by every mandate of duty to be fair and impartial in doing his work. It cannot be presumed that his bias would be greater toward the defendant than toward his fellow employees and their dependents. It follows that under these circumstances there was no evidence of bad faith on the part of the committee.

Exceptions sustained.

ALICE T. ENGLISH vs. CHARLES R. ENGLISH & another.

Suffolk. November 12, 1917. — December 31, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Husband and Wife. Agency. Power of Attorney. Equity Jurisdiction, To set aside conveyance of real estate made in excess of authority.

Where a husband conveys property to his wife, without any agreement on the part of the wife as to the way in which she shall hold it, there is no presumption that it is received in trust and the wife as between herself and her husband holds the property absolutely, an unexpressed intention of the husband in making the conveyance being immaterial as between the parties to it.

Where a wife, with the consent of her husband, went to a foreign country to live and gave to her husband, at his request, a power of attorney authorizing him, among other powers, to sell and transfer certain real estate which the husband and wife formerly had occupied as a home and which he had conveyed to her without any trust, and where the wife thereafter refused without justification to return to live with her husband, and the husband before obtaining a divorce from her for desertion made use of the power of attorney to convey the real estate through a third person to himself, it was *held* that the wife could maintain a suit in equity against her former husband to set aside the conveyance, because the authority given by the power of attorney was restricted necessarily to transactions appurtenant to the business and designed for the benefit of the owner of the real estate and that the instrument conferred on the husband no right to convey the property to himself for his own advantage to the detriment of the owner.

BILL IN EQUITY, filed in the Superior Court on February 10, 1916, by Alice Tamar English, of London in the Kingdom of Great Britain, against Charles R. English of Boston, the husband or former husband of the plaintiff, and one Mary E. Childs, for an order to reconvey to the plaintiff a certain parcel of land with buildings thereon in the part of Newton called West Newton belonging to the plaintiff, which the defendant Charles R. English wrongfully conveyed to the defendant Childs under the pretended authority of a power of attorney from the plaintiff dated September 13, 1909, and which the defendant Childs conveyed to the defendant English.

The case was heard by *Jenney, J.*, who made a finding of facts, including the facts that are stated in the opinion. The judge made an order that a decree be entered dismissing the bill as to the

defendant Childs without costs and directing the defendant English to convey the property to his former wife, "inasmuch as a reconveyance is necessary in order to remove the cloud from her title caused by his attempt to vest the same in himself."

Later by order of the judge a final decree was entered dismissing the bill as to the defendant Childs without costs and ordering the defendant English to execute and deliver to the plaintiff a quitclaim deed of the premises described in the bill, subject to a certain mortgage, and that the defendant English also pay to the plaintiff \$71.86 as the balance due on an accounting for the rents and profits less the expenses of the property from January 13, 1916, to April 1, 1917.

The defendant Charles R. English appealed.

C. C. Barton, Jr., for the defendant English.

E. Everett, for the plaintiff.

RUGG, C. J. The material facts as found by the judge of the Superior Court are, that the defendant in 1904 caused an estate then owned and occupied by himself and his family as a home to be conveyed to the plaintiff, his wife, intending "to reserve the real estate away from the vicissitudes of business," and not to give his wife any beneficial interest, but still to own the property if he happened to get into any financial difficulty. He expected that thereby his family would be secured in a home with him free from the adversities of business, and relied on the willingness of his wife to convey the property as he might request. There was no evidence that the wife procured the conveyance or made any promise to hold the property for her husband's benefit, or that she agreed to reconvey it to him at his request. There was no mutual understanding between the two that she should hold the property for his benefit solely; but she received the conveyance for her own benefit and that of her husband and family.

The title to the property under these circumstances vested absolutely in the wife as between herself and her husband. A husband and wife cannot make contracts with each other. R. L. c. 153, § 2. St. 1912, c. 304. When either pays money or transfers or conveys property to the other, there is no presumption that it is received in trust. If a trust is alleged to exist, it must be proved. In the absence of such proof, it must be deemed that the money, property or conveyance was received with the intention that it be ap-

plied to the use and benefit of either or both at the discretion of the recipient. *Jacobs v. Hesler*, 113 Mass. 157, 160, 161. *Clark v. Patterson*, 158 Mass. 388, 391.

The wife subsequently went to England to live, with the consent of her husband. She gave him at his request a power of attorney, which among other matters conferred power to sell or transfer the land in question. Later she refused without justification to return to Massachusetts to live with her husband, and he obtained a divorce from her for that cause. About one month before filing the libel for divorce, without the knowledge or consent of the wife, the husband, purporting to act under the power of attorney, conveyed the real estate to one Childs, who was simply a conduit and later conveyed it to the husband. This bill is brought for a reconveyance and accounting.

The power of attorney did not authorize the husband to make a conveyance to himself under the circumstances here disclosed. He was an agent for the wife, who held the unqualified title to the property subject to incumbrances. The husband's antecedent connection with the real estate gave him no more extensive right in it than would have been possessed by any other agent acting under the power of attorney. His authority under the power of attorney was not unlimited. It was necessarily restricted to transactions appurtenant to the business and designed for the benefit of the owner. It conferred no right to convey the property to himself or for his advantage, to the detriment of the interests of the owner. *Odiorne v. Maxcy*, 13 Mass. 178, 181. *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197, 202. *Dzuris v. Pierce*, 216 Mass. 132, 136. *Hall v. Paine*, 224 Mass. 62, 73, 74.

Decree affirmed with costs.

COMMONWEALTH vs. CHARLES W. TITCOMB.

Suffolk. December 3, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Milk. Constitutional Law, Class legislation.

The statute contained in R. L. c. 56, §§ 57, 62, as amended by St. 1910, c. 641, §§ 1, 2, making it a criminal offence to sell milk which is not of good standard quality and providing that "A producer of milk shall not be liable to prosecution for the reason that the milk produced by him is not of good standard quality unless" the sample of the milk has been taken in a certain way and unless he has failed to bring his milk to the legal standard within twenty days after notice in writing, while giving no such privilege and exemption to dealers in milk who are not producers, does not violate any right secured by the Constitution of the United States. Following *St. John v. New York*, 201 U. S. 633. Nor is the statute described above in contravention of any provision of the Constitution of the Commonwealth.

COMPLAINT, subscribed and sworn to in the Municipal Court of the Roxbury District of the City of Boston on December 8, 1916, under R. L. c. 56, § 57, as amended by St. 1910, c. 641, §§ 1, 2, charging that the defendant on August 11, "at Boston . . . within the judicial district of said court . . . did have in his custody milk not of good standard quality, that is to say, milk containing less than twelve and fifteen hundredths per cent of milk solids, with intent then and there unlawfully to sell the said milk within this Commonwealth," and also at the same time and place "did have in his custody with intent to sell as pure milk, milk from which a part of the cream thereof had been removed."

On appeal to the Superior Court the case was tried before *Morton, J.* At the close of the evidence the defendant asked the judge to make the following ruling:

"The statute under which count one of the complaint is drawn is in violation of the limitations and restrictions of the Constitutions of the Commonwealth of Massachusetts and of the United States, and no conviction can be had for the violation of the statute under which the complaint is drawn."

The judge refused to make the ruling requested. The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. A. Parker, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

Rugg, C. J. The issue presented in this case is the constitutionality of R. L. c. 56, §§ 57 and 62, as amended by St. 1910, c. 641, §§ 1 and 2. Section 57 in substance imposes a penalty upon every person who, by himself, his servant or agent, or as the servant or agent of another, sells, exchanges or delivers, or has in his possession with intent to sell or deliver milk "which is not of good standard quality," a standard established by §§ 55 and 56 of the same chapter as amended by St. 1908, c. 643, (see now St. 1917, c. 189,) and not now questioned. *Commonwealth v. Wheeler*, 205 Mass. 384. Section 62, as amended, is in these words: "A producer of milk shall not be liable to prosecution for the reason that the milk produced by him is not of good standard quality unless such milk was taken upon his premises or while in his possession or under his control by an inspector of milk, by a collector of samples of milk, or by an agent of the dairy bureau or of the State board of health, and a sealed sample thereof was given to him, nor unless he shall fail to bring the milk produced by him to the legal standard for milk solids and milk fat within twenty days after written notice has been sent from the officer taking said sample that it is below said standard. At any time after the said period of twenty days allowed the producer to bring his milk to the legal standard has elapsed the officer taking the first sample may take a second sample, and if it shall be found to be below the legal standard for milk solids and milk fat prosecution may follow."

This statute is assailed as being arbitrarily discriminatory in favor of the producer of milk and against the seller who is not a producer, and as making an unfair and unreasonable classification, and as being violative of rights secured by the Constitution of the United States. So far as the Federal Constitution is concerned, these contentions of the defendant seem to us to be disposed of adversely by the decision of *St. John v. New York*, 201 U. S. 633. The statute of New York there under consideration prohibited under penalty the sale of "adulterated milk," a term so defined as to include not only milk to which foreign matter had been added or from which cream had been removed, but also milk in its natural and pure state deficient in certain percentages of

milk solids and fat, but altogether exempted from its operation producers of milk whose herd of cows naturally produced milk when mixed falling below the percentages of solids and fat required by the statute. In substance and effect that statute provided that a producer of milk might freely sell milk in its natural state, while all others were subject to a penalty for selling the same milk provided it did not conform to the statute standard. That statute was held not to violate any rights secured by the Federal Constitution. It there was said: "If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration — the ways it may be defeated. Legislation to be practical and efficient must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vendor, he is exempt from the penalty; as it cannot certainly be proved in the hands of other vendors so as to prevent evasions of the law, such vendors are not exempt. In the one case the source of milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances." In that opinion the court did not even refer to *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 565, relied on by the defendant. In numerous other decisions that case has been distinguished and various classifications have been upheld against attack on the ground of inequality or discrimination. *Adams v. Milwaukee*, 228 U. S. 572. *District of Columbia v. Brooke*, 214 U. S. 138. *International Harvester Co. v. Missouri*, 234 U. S. 199. *Chicago, Terre Haute & Southeastern Railway v. Anderson*, 242 U. S. 283. *Ozan Lumber Co. v. Union County National Bank of Liberty*, 267 U. S. 251, 256. *McLean v. Arkansas*, 211 U. S. 539.

Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224. *Hall v. Geiger-Jones Co.* 242 U. S. 539, 555-557. *Booth v. Indiana*, 237 U. S. 391, 397. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78. *Jeffrey Manuf. Co. v. Blagg*, 235 U. S. 571. *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61. See *Tanner v. Little*, 240 U. S. 369, 380, 384.

The statute is not in contravention of any provision of the Constitution of this Commonwealth. The statute is designed to protect and promote the public health. Under present conditions of life milk is an essential article of food in almost universal use. Any statute rationally adapted to the end of securing its purity, preserving unimpaired its natural qualities, and securing it from adulteration, plainly is within the power of the Legislature. It was said in *Commonwealth v. Graustein & Co.* 209 Mass. 38, 42, that "The history of the milk legislation in this Commonwealth shows conclusively the determination of the law making power to protect the community from adulterated or impure milk." The intent of the vendor has been made immaterial. The main object being to shield the public from an imposition in guise of a fluid which may look like pure milk and yet be either adulterated or skimmed, an imposition difficult of detection, necessarily there must exist a wide discretion in the selection of appropriate means. It would be comparatively simple to ascertain whether the quality of milk offered for sale by the farmer, either at his door or at wholesale or retail delivery, was that produced naturally by his herd. It would be difficult commonly to find out whether the milk offered for sale, especially in cities, by dealers who were not producers, was of the natural quality given by the cows from which it had come. This and perhaps other conditions may have been within the knowledge of the Legislature in deciding that, in order to protect the public from imposition and the consequent possibility of sickness, a classification of vendors of milk into those who were producers and those who simply were dealers was necessary, or at least wise. When the statute is considered in its application to two vendors of milk selling in competition side by side, one a producer and the other a dealer who is not a producer, it has an appearance of inequality. See *O'Keeffe v. Somerville*, 190 Mass. 110, 113; *Gleason v. McKay*, 134 Mass. 419; *Opinion of the Justices*, 196 Mass. 603, 627. This appearance is strengthened by the sugges-

tion that the non-producing seller may have bought his milk of his competitor who is also a producer. But placing the situation in its true perspective minimizes this seeming inequality and demonstrates that it may not be substantial. The ultimate aim of the statute is to secure a pure and healthful article of food of widespread use. The individual consumer ordinarily is unable to detect adulteration and is well nigh powerless to defend himself against such deception. It is not commonly discernible on a superficial inspection. These factors justify a reasonable classification. The Legislature may have found that common experience has demonstrated that impurities and adulterations are found in the vast majority of instances in milk kept for sale by non-producing dealers and only in a comparatively insignificant and negligible number of instances in milk offered for sale by the owner of the cows from which the milk comes. It may have found also that instances of milk below the established standard offered for sale by producers arise usually from the failure of the cows to produce milk of that quality, rather than from any wilful act of the producer. It is, perhaps, matter of common knowledge that some breeds of cows often do not give milk of the quality required by the Massachusetts standard. See *Commonwealth v. Wheeler*, 205 Mass. 384. If that be so, it may have been thought that the farmer should be given a chance to bring the milk of his herd up to the required standard before rendering him liable to prosecution. Moreover, practical difficulties in the way of proving actual adulteration of milk in the hands of the non-producing vendor, not arising in the case of the producing vendor, can easily be conceived to exist. These considerations and perhaps others lead to the conclusion that a classification of vendors of milk into those who are producers and those who are not cannot be said to rest upon an immaterial, unreasonable, or arbitrary distinction. The Legislature has ample power under the Constitution to enact statutes regulating conduct based upon classifications which have some rational connection with the preservation of the public health. It may exclude some from their operation so long as such exclusion has a reasonable relation to the result to be achieved and is not a whimsical or arbitrary selection. It cannot proscribe one class upon the basis of race, *Opinion of the Justices*, 207 Mass. 601, of being a defendant rather than plaintiff, *Opinion of the Jus-*

tices, 207 Mass. 606, nor confer special privileges upon members of particular organizations, *Opinion of the Justices*, 211 Mass. 618, *Adair v. United States*, 208 U. S. 161, *Coppage v. Kansas*, 236 U. S. 1, nor attach extravagant penalties for failure to settle civil claims, *St. Louis, Iron Mountain & Southern Railway v. Wynne*, 224 U. S. 354, *Chicago, Milwaukee & St. Paul Railway v. Polt*, 232 U. S. 165, nor provide that railroad conductors shall be selected exclusively from a certain class of brakemen, *Smith v. Texas*, 233 U. S. 630, nor fail to establish equality of burden in respect of delinquency on the part of the carrier and shipper. *Atchison, Topeka & Santa Fe Railway v. Vosburg*, 238 U. S. 56, 61. But none of these instances are like in principle to the statute here attacked.

The employers' liability act and the workmen's compensation act each has exempted farmers from its operation and has not been regarded as thereby rendered unconstitutional. *Opinion of the Justices*, 209 Mass. 607, 610. *Young v. Duncan*, 218 Mass. 346, 353. *Rowley v. Ellis*, 197 Mass. 391.

The classification made by the statute here assailed bears a reasonable relation to the accomplishment of a lawful purpose and is not a mere arbitrary choice or preference. It falls within the principle of numerous of our decisions. *J. P. Squire & Co. v. Teller*, 185 Mass. 18, 21. *Mutual Loan Co. v. Martell*, 200 Mass. 482, affirmed 222 U. S. 225. *Dewey v. Richardson*, 206 Mass. 430. *Commonwealth v. Danziger*, 176 Mass. 290. *Rideout v. Knox*, 148 Mass. 368. *Commonwealth v. Beaulieu*, 213 Mass. 138. *Commonwealth v. Libbey*, 216 Mass. 356, 358. *Bogni v. Perotti*, 224 Mass. 152, 157.

Exceptions overruled.

COMMONWEALTH vs. JAMES E. HENRY.

Middlesex. December 6, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Motor Vehicle. Words, "Operated."

If one driving a motor car leaves it standing in a public highway at any time between half an hour after sunset and half an hour before sunrise with all the lights extinguished and the engine at rest, he is operating the car unlawfully and may be convicted on a complaint under St. 1909, c. 534, § 7, as amended by St. 1915, c. 16, § 3.

Whether the same offence would be committed after the car had been left in the

highway an unreasonable time or if it had been abandoned there, were referred to as questions which it was not necessary to consider in the present case.

COMPLAINT, received and sworn to in the First District Court of Eastern Middlesex on May 5, 1915, under St. 1909, c. 534, § 7, as amended by St. 1915, c. 16, § 3, charging that the defendant on May 3, 1915, at Malden "did operate a certain automobile in and upon a certain public street, to wit: Pleasant Street in said Malden, during the period of from one half an hour after sunset to one half an hour before sunrise, without displaying at least two white lights, visible not less than two hundred feet in the direction toward which he was proceeding and without displaying at least one red light in the reverse direction."

On appeal to the Superior Court the case was tried before *Raymond, J.* A statement of the facts which were agreed upon by the Commonwealth and the defendant is quoted in the opinion.

The defendant asked the judge to rule and instruct the jury as follows:

"1. There is no evidence in the case warranting a conviction that the defendant operated an automobile unlawfully, and you should return a verdict of not guilty.

"2. There is no evidence warranting a conviction that the defendant operated an automobile without its being properly lighted, and you should return a verdict of not guilty.

"3. Unless you find the defendant's automobile was in motion and that he was driving the same, you must find him not guilty of the offence charged in the complaint.

"4. If you find that the defendant, upon leaving his automobile standing in the street, turned out the lights thereof, the presence of the automobile in the street thereafter was not operation on his part, and your verdict should be for the defendant."

The judge refused to make any of these rulings. The jury returned a verdict of guilty; and the defendant alleged exceptions.

St. 1909, c. 534, § 7, as amended by St. 1915, c. 16, § 3, after provisions in regard to brakes, mufflers, means of signalling and contrivances to prevent motor vehicles being set in motion by unauthorized persons, is as follows: "Every automobile operated during the period from one half an hour after sunset to one half an hour before sunrise shall display at least two white lights, and

every motor cycle so operated at least one white light, which shall be visible not less than two hundred feet in the direction toward which the vehicle is proceeding; and every such motor vehicle shall display at least one red light in the reverse direction. Every automobile so operated shall have a rear light so placed as to show a red light from behind and a white light so arranged as to illuminate and not obscure the rear register number."

The case was submitted on briefs.

W. A. Thibodeau & G. L. Ellsworth, for the defendant.

N. A. Tufts, District Attorney, & *F. W. Fosdick*, Deputy District Attorney, for the Commonwealth.

CROSBY, J. The defendant is charged with violation of the provisions of St. 1909, c. 534, § 7, as amended by St. 1915, c. 16, § 3. He was found guilty by the First District Court of Eastern Middlesex, and appealed. At the trial in the Superior Court he excepted to the refusal of the presiding judge to give to the jury four instructions, each of which in effect amounted to a ruling that he was entitled to an acquittal upon the agreed facts. The facts agreed upon are as follows:

"It is hereby agreed between the government and the defendant that on May 3, 1915, at about 8:30 in the evening, more than half an hour after sunset on said date the defendant drove his automobile on Pleasant Street, a public way in the City of Malden in said County, and left it standing thereon; that when and as he drove it on said street it was properly lighted, but that when he left it standing as aforesaid he turned out both his front lights and rear light; that when he left the automobile standing, no part thereof was moving and that the engine was stopped; that the defendant thereafter went into a building nearby, leaving the said automobile on said street until notified."

The statute under which the complaint is drawn was enacted largely for the protection of travellers upon highways, by guarding against collisions with automobiles after dark when it would be difficult or impossible to know of their presence. The question is, whether a motor car which is left standing upon a highway after dark without lights and with the engine at rest can be found to be "operated" within the meaning and intent of the statute.

It is obvious that a motor car standing upon a highway under

such conditions may be fully as great a menace to the safety of travellers as if running upon the way without lights, and that the danger of serious injury to travellers by coming in contact with such a car would be very great.

The word "operated" is not, as the defendant contends, limited to a state of motion produced by the mechanism of the car, but includes at least ordinary stops upon the highway, and such stops are to be regarded as fairly incidental to its operation. It does not appear from the agreed facts how long the car had been left upon the street or for what purpose the defendant went into the building. Certainly there is nothing to show that he had left it for an unreasonable time, or that the stop was not for a proper purpose; nor is there any evidence that the car had been abandoned, although we do not mean to intimate that if it had been the statute would not have been violated. As was said in the recent case of *Stroud v. Water Commissioners of Hartford*, 90 Conn. 412, in construing a similar statute, "The word 'operation' . . . must include such stops as motor vehicles ordinarily make in the course of their operation. . . . In this case the plaintiff's car was as much in the ordinary course of operation on the highway at the time of the injury as if it had been used for shopping, calling, or delivering merchandise." It was said by this court in *Smethurst v. Barton Square Independent Congregational Church*, 148 Mass. 261, at page 266, that "In order to be a traveller, it is not necessary that one should be constantly moving, if he is a pedestrian, or that the vehicle he drives, or that in which he is conveying goods, if he is using one, shall be continuously in motion. It would certainly be impossible to use the highways conveniently for the ordinary purposes of business or social life with teams or lighter carriages, if occasional stops were not permitted to enable those using them to load and unload teams, to receive and deliver goods, to enter shops and stores, and to make brief calls of business or even of a social character."

The statute must be read with reference to its manifest intent and spirit and cannot be limited to the literal meaning of a single word. It must be construed as a whole and interpreted according to the sense in which the words are employed, regard being had to the plain intention of the Legislature. So considered, we cannot doubt that the statute is broad enough to include automobiles at

rest, as well as in motion, upon the highways. *Jaquith v. Worden*, 73 Wash. 349. *Stroud v. Water Commissioners of Hartford*, *supra*. So far as the case of *Harlan v. Kraschel*, 164 Iowa, 667, is in conflict with the views herein expressed, we are not disposed to follow it.

The defendant's requests for instructions were refused rightly.

Judgment affirmed.

J. WILFRID BEAUCHEMIN & others vs. J. FRANK FLAGG & another.

Worcester. October 2, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Elections, Marking of ballot.

In the provision of the election laws contained in St. 1913, c. 835, § 292, as amended by St. 1914, c. 435, that "The voter on receiving his ballot shall, . . . except in the case of voting for presidential electors, prepare his ballot by making a cross [X] in the square at the right of the name of each candidate for whom he intends to vote," the requirement that the cross shall be marked "in the square" is merely directory and not mandatory, and a vote for a candidate may be counted where the cross was marked by the voter against the name of the candidate between that name and the square, if the intention of the voter to vote for the candidate is manifest.

PETITION, filed on March 20, 1917, by ten qualified voters of the town of Hubbardston for a writ of mandamus addressed to J. Frank Flagg, the moderator of the annual town meeting held on February 5, 1917, and William H. Wheeler, the town clerk of Hubbardston, commanding them to make a recount for school committee, counting as blank seven ballots which at the town meeting were counted for Maud Vanston Lufkin as a member of the school committee and declaring George H. Kelton, the opposing candidate, to have been elected a member of the school committee.

The case was heard by *Carroll, J.*, who made the findings of fact and the ruling of law that are described in the opinion. He made an order for a decree that a writ of mandamus should issue and at the request of the parties reported the case for determination by the full court. If the ruling of law made by the single justice was right, the writ was to issue. If the ruling made by him was wrong, the petition was to be dismissed.

The case was argued at the bar in October, 1917, before *Rugg, C. J., Loring, Braley, De Courcy, & Pierce, JJ.*, and afterwards was submitted on briefs to all the justices except *Loring & Carroll, JJ.*

H. W. Blake, for the petitioners.

C. M. Thayer, F. C. Smith, Jr., & G. A. Gaskill, for the respondents, submitted a brief.

DE COURCY, J. At the annual town meeting in Hubbardston Maud Vanston Lufkin was a candidate for the school committee. On the original count and at the recount she was declared elected. Seven of the ballots counted for her were marked, each with a cross against her name and between the square and her name, but not in the square. If these seven ballots are not counted for her George H. Kelton, her opponent, will be elected. The single justice before whom the petition for a writ of mandamus was heard, found as a fact that it was the intention of the voter in each case to vote for Maud Vanston Lufkin. He ruled as matter of law, however, that the statute required the voter to express his choice in the square, and not elsewhere on the ballot, and the ballots must be counted as blanks; and reported the case to the full court with a stipulation that if this ruling was not right the petition should be dismissed.

Where a ballot is so marked that upon inspection it indicates with reasonable certainty the candidate for whom the elector intended to vote, the vote should be counted in accordance with that intent, provided the voter has substantially complied with the requisites of the election statute. *Strong, petitioner*, 20 Pick. 484. *Ray v. Ashland*, 221 Mass. 223. *Woodward v. Sarsons*, L. R. 10 C. P. 733. It is settled by the finding of the single justice that these seven voters intended to cast their ballots for Mrs. Lufkin. That distinguishes this case from *O'Connell v. Mathews*, 177 Mass. 518 and *Flanders v. Roberts*, 182 Mass. 524, where the intent of the voter was left to mere conjecture, as the cross was marked in the square opposite a blank; and from *Brewster v. Sherman*, 195 Mass. 222, where the single justice was unable to determine how the voter intended to vote on the question submitted.

That these seven voters honestly attempted to comply with the terms of the statute is not questioned. In order to determine whether there was a substantial compliance with its provisions

it is well to have before us the following sections which are applicable:

St. 1913, c. 835, § 259. “. . . Ballots shall be so printed as to give to each voter an opportunity to designate by a cross [X], in a square at the right of the name and designation of each candidate . . . his choice of candidates. . . .”

Section 292 (as amended by St. 1914, c. 435). “The voter on receiving his ballot shall, . . . except in the case of voting for presidential electors, prepare his ballot by making a cross [X] in the square at the right of the name of each candidate for whom he intends to vote or by inserting the name and residence of such candidate in the space provided therefor and making a cross in the square at the right; and, upon a question submitted to the vote of the people, by making a cross in the square at the right of the answer which he intends to give.”

Section 303. “. . . If a voter marks more names than there are persons to be elected to an office, or if his choice cannot be determined, his ballot shall not be counted for such office.”

It is to be noted that, although § 292 provides that the voter shall make a cross “in the square at the right of the name,” the only provision which expressly forbids the counting of a ballot deposited in the ballot box is § 303, and that applies only to cases where the voter's choice cannot be determined.

The Legislature, in contested election cases, has construed this requirement as to marking a cross in the square to be directory and not mandatory, where the voter's intent is manifest. See *Moore v. Booth*, 1910, House Document 259 and *Riley v. Aldrich*, 1904, House Document 343 — where crosses were marked between the candidate's name and the square. Under the earlier statute it was likewise held that such informality does not nullify the ballot. *Shepard v. Sears*, Mass. Election Cases, 1886-1902 (Russell's ed.), 30; *Jones v. Loring*, 36; *Adams v. Moore*, 79.

The precise question here involved has not been before this court. In *Ray v. Ashland*, 221 Mass. 223, 226, the candidate's name was not printed on the ballot, and the voter used a paster on which the candidate's name appeared. Section 259 of the election statute provides: “Blank spaces shall be left at the end of the list of candidates for each different office, equal to the number to be elected thereto, in which the voter may insert the name of any per-

son not printed on the ballot for whom he desires to vote for such office." Instead of placing the paster in the blank space the voter placed it over the name of the candidate printed on the ballot. It was held that the ballot properly might be counted as a vote for the person named on the slip, the statutory provision as to the precise place of inserting the name being directory and not mandatory. In our opinion that case in principle governs the case at bar; and the language used in the opinion is equally applicable here: "The statute does not say that he [the voter] must use this mode of expressing his will or his ballot is defective. If the construction by implication the petitioner urges is adopted, he [Kelton] gets an office to which he has not been elected, unless the will of a majority of the voters at an election, where no fraud or misconduct appears or is claimed, is nullified, a result wholly inconsistent with the spirit of our election laws. The Legislature, if it intended to restrict the voter to the use of the blank spaces [squares] alone, should have directed in appropriate language that this was the only way in which the voter could express an independent choice."

The decisions in other jurisdictions as to such irregularities in marking a ballot are not uniform. In some States the Massachusetts rule is adopted, and emphasis is placed upon giving effect to the voter's intention where it can be fairly determined on inspection of the ballot. In other States the provisions of the local statute as to the position of the cross mark are construed to be mandatory; or emphasis is placed on the possibility that marking the ballot in an improper place may reveal the identity of the voter, and render the ballot invalid for that reason. For collection of cases see 20 Ann. Cas. 672, 674; 47 L. R. A. 806, 827-831; 15 Cyc. 354, 357. Mass. Election Cases, 1886-1892 (Russell's ed.), editor's note 89-100.

To avoid misapprehension it may be said that this decision does not involve the question whether the location of the cross constituted a "mark upon a ballot by which it may be identified," within the prohibition of § 295. Presumably the single justice determined that question of fact in the negative, as he did not report it for our consideration.

For the reasons hereinbefore stated a majority of the court are of opinion that the statute did not make it mandatory to count

these seven ballots as blanks; and in accordance with the terms of the report the petition should be dismissed.

Ordered accordingly.

JOSEPH MILLEN vs. MOSES H. GULESIAN & trustee.

Suffolk. October 19, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Damages, Liquidated. Contract, Building contracts. Practice, Civil, Exceptions, Rulings and instructions, Judge's charge.

Where, in a declaration in set-off, filed by the defendant in an action on a contract to furnish all the ornamental iron work in a theatre, the defendant under an express provision of the contract seeks to recover \$50 for every week that the work, or the several portions thereof, remained unfinished after the dates specified for completion, attempting to enforce this provision as one for liquidated damages and not a penalty, he cannot be allowed to introduce evidence to show the amount of loss occasioned to him by the delay in opening the theatre, he being confined to the measure of damages for delay which by the terms of the contract he had agreed upon in advance. In the present case the exclusion of this evidence on the question of damages was rendered immaterial by a finding of the jury that the plaintiff was not liable on the defendant's declaration in set-off.

A refusal by a presiding judge to give a ruling requested is made immaterial by a finding of the jury that an assumed fact on which the request is founded does not exist.

It is right for a presiding judge to refuse to make a ruling which is not applicable to the evidence.

An exception to a portion of the charge of a judge cannot be sustained where the facts necessarily involved in the findings of the jury show that the excepting party was not aggrieved by the portion of the charge excepted to.

CONTRACT, the declaration containing two counts, the first for \$8,285 on an account annexed and the second for the alleged breach of an express contract in writing, which it was alleged that the plaintiff was prevented from completing after he had furnished labor and materials to the amount of \$7,625. Writ dated July 10, 1912.

The defendant filed a declaration in set-off, which is described in the opinion.

In the Superior Court the case was tried before *Sanderson, J.* The work and labor were upon, and the contract in writing related

to furnishing, the ornamental iron work for the construction of the St. James Theatre in Boston. The defendant offered to introduce evidence showing the amount of loss occasioned him by the delay in opening the theatre, but the judge ruled that such loss was immaterial and excluded the evidence. The defendant excepted. There was conflicting evidence on the question of waiver of performance by both parties. Other evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to rule and instruct the jury as follows:

"14. If the jury find that it would have cost the plaintiff to complete the work more than the unpaid balance of the contract price, the plaintiff cannot recover under the second count of his declaration.

"15. If the defendant did at any time fail to make any payment due the plaintiff under the terms of the contract, the plaintiff waived any right which he might otherwise have had to insist upon such non-payment as an excuse for the non-performance of his part of the contract by continuing to perform his work and insisting upon the right to complete his contract."

The judge refused to make either of these rulings. The jury found for the plaintiff both on his declaration and on the defendant's declaration in set-off. The jury made the general and special findings that are stated in the opinion; and the defendant alleged exceptions, which are there described.

The case was submitted on briefs.

J. W. Pickering, for the defendant.

F. P. Garland & A. G. Gould, for the plaintiff.

DE COURCY, J. The parties entered into a written contract, dated January 25, 1912, by which the plaintiff agreed to furnish and install all the metal work (except the structural metal work) for the defendant's theatre, as set forth in the plans and specifications, for the sum of \$8,825. On June 3, 1912, the defendant gave to the plaintiff a notice (which is not set out in the record) in accordance with section III of the contract, and on the expiration of ten days provided other workmen and materials and completed the work. At the trial of this action for breach of the contract the evidence for the plaintiff on every material issue apparently was contradicted. But as the verdict was in his favor, it is enough to

say that on his testimony it could be found that he got the material of different kinds as soon as he was given the measurements, made deliveries as soon as the building was ready for them, and was prepared to perform his part of the agreement when ordered away from the building by the defendant.

The jury found for the plaintiff in the sum of \$2,387.37, and found for the plaintiff on the defendant's declaration in set-off. They further answered, in reply to questions submitted to them by the presiding judge, that the sum reasonably necessary after June 14, 1912, to complete the work called for by the contract was \$5,768; that neither of the parties lived up to the terms of the contract; that the plaintiff acted in good faith in the performance of his part of the agreement; and that they determined the amount of the verdict by deciding that he was entitled to \$3,056.87 less \$1,100 already received by him on account, together with \$430.50 interest.

The defendant's exceptions are to the exclusion of evidence, to the refusal to give two rulings requested, and to certain parts of the judge's charge on the issue of damages. We consider them in that order.

1. The defendant offered to introduce evidence showing the amount of loss occasioned him by the delay in opening the theatre. The contract provided that the plaintiff should "forfeit and pay to" the defendant \$50 for each and every week that the work, or the several portions thereof, should remain unfinished after the dates specified therefor; and the defendant, in his declaration in set-off, claimed that amount for twenty weeks, or from February 18, 1912, to the date of the writ. Evidently he tried his case on the assumption that this provision was one for liquidated damages and not a penalty, (see *Kaplan v. Gray*, 215 Mass. 269,) and he should be confined to the measure of damages for delay which he had agreed upon in advance. *Morrison v. Richardson*, 194 Mass. 370. But, even if there were error in excluding this evidence on the question of damages, it was made immaterial by the finding that there was no liability on the defendant's declaration in set-off. *Ducharme v. Holyoke Street Railway*, 203 Mass. 384. *Cotter v. Nathan & Hurst Co.* 222 Mass. 433.

2. We do not find it necessary to consider the fourteenth ruling requested, in view of the finding of the jury that the cost of completing the work was less than the unpaid balance of the con-

tract price; which rendered the request immaterial. *McIntosh v. Hastings*, 156 Mass. 344.

3. The fifteenth request was not applicable to the evidence. We do not understand that the plaintiff excused any failure to perform his contract on the ground of the non-payment of money due to him, or that he admitted non-performance. In any event, the question of waiver of his rights was for the jury.

4. On the special findings of the jury it must be taken that the defendant wrongfully prevented the plaintiff from completing his work. That would justify the verdict in favor of the plaintiff for the contract price less the reasonable cost of completing the work by the defendant, if nothing further appeared. The jury also found, however, that the plaintiff did not live up to the terms of his contract; but they found that he acted in good faith in the performance of his part. It is stated in the record that "there was conflicting evidence on the question of waiver of performance by both parties." It is to be presumed, in view of the general verdict for the plaintiff, that the jury found either that the breach by the plaintiff was not substantial, or that it was waived by the defendant. It follows that the exceptions do not show that the defendant was aggrieved by the portions of the charge excepted to. *Rowley v. Ray*, 139 Mass. 241, 244. *Phillips v. Chase*, 203 Mass. 556.

Exceptions overruled.

CLAYTON W. HARTFORD *vs.* MASSACHUSETTS BOWLING
ALLEYS, INCORPORATED.

Suffolk. October 19, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Corporation, Officers and agents, Directors, By-laws. Agency.

Where the whole capital stock of a corporation operating bowling alleys was owned by three persons, who were respectively the president, the clerk and the treasurer of the corporation and together constituted its board of directors, and where it appeared that by their acts, without any vote on the subject, the directors had constituted the director who was treasurer the managing director or general agent in charge of all the business of the corporation and that such

managing director hired a manager of the bowling alleys to serve for one year for \$30 a week and five per cent of the net profits, and that the other two directors saw this manager working at the corporation's place of business and raised no question as to the treasurer's authority to employ him and made no inquiry about the terms of his employment, if the manager thus employed is discharged without cause in about two months, he may maintain an action against the corporation for its breach of contract, and in such action he has a right to go to the jury on his allegation that the managing director had implied authority from the corporation to employ him as manager for one year.

In such action it is no defence for the corporation that a by-law, unknown to the plaintiff, required by its terms that the manager and the other employees should be appointed by the board of directors and that no vote or meeting of the directors ever had authorized the employment of the plaintiff.

CONTRACT against a corporation operating bowling alleys in Boston for wrongfully discharging the plaintiff in less than two months after having agreed to employ him as manager for one year at the compensation of \$30 a week and five per cent of the net profits. Writ dated March 7, 1916.

In the Superior Court the case was tried before *Hitchcock, J.* The evidence, so far as it appeared in the bill of exceptions, is described in the opinion. At the close of the evidence the judge submitted to the jury the following questions:

"1. Was an agreement made between Leavitt as treasurer of the defendant company and the plaintiff Hartford to employ Hartford as manager of the defendant alleys for a term of one year?" The jury answered, "Yes."

"2. If there was such an agreement, and if the plaintiff is entitled to recover damages for a breach thereof, what is the amount of such damage?" The jury answered, "\$1,240.20."

The judge ruled that there was no evidence that Leavitt had authority to make a contract, binding upon the defendant, to hire the plaintiff for one year, and ordered the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

W. J. Kelly & F. M. J. Sheenan, for the plaintiff.

B. A. Levy & J. M. Graham, for the defendant.

DE COURCY, J. The plaintiff seeks to recover for the breach of an alleged agreement to hire him as manager of the defendant's bowling alleys for one year, at a salary of \$30 a week and five per cent of the net profits. From the evidence disclosed by the meagre record the jury could find the following facts:

Edward R. Sherburne was president, Benjamin A. Levy was clerk and Peter M. Leavitt treasurer of the defendant corporation. These three constituted the board of directors and owned all the capital stock. The company was incorporated in 1915, and apparently the alleys were opened for business late in December of that year. As matter of fact the entire work of fitting up and furnishing the bowling alleys and doing whatever was necessary in opening them up for business, including the hiring of help, was in charge of Leavitt, and the other directors seem to have taken no active part.

On or about December 10, 1915, the plaintiff talked with Leavitt in reference to entering the employ of the defendant as manager of its bowling alleys, and, as the jury have specially found, an agreement to that effect was made for a term of one year. The plaintiff started to work that day, and continued as manager for four weeks. Sherburne testified that the hiring of the plaintiff "was left to Mr. Leavitt;" and both he and Levy saw the plaintiff working at the defendant's place of business, raised no question as to Leavitt's authority to employ him and made no inquiry about the terms of his employment. On February 5, 1916, Sherburne informed the plaintiff that a third interest in the business had been sold, and notified him that he would not be needed after that night. At the trial the defendant submitted extracts from its by-laws, dealing with the authority of the board of directors to appoint a manager and other employees; and also evidence that at no meeting of the board was Leavitt, or Sherburne or any other person authorized to employ the plaintiff.

The trial judge ruled that "there was no evidence that Leavitt had authority to make a contract, binding upon the defendant, to hire the plaintiff for one year," and directed a verdict for the defendant.

In our opinion the ruling was wrong. The office of the by-law was to define the powers and duties of the directors toward the corporation and between themselves. Its limitation of Leavitt's authority was not known to the plaintiff, and did not affect his rights. *Flint v. Pierce*, 99 Mass. 68. It was not necessary for the plaintiff to show that Leavitt had implied authority as treasurer to hire a manager. See *Merchants' National Bank of Gardiner v. Citizens' Gas Light Co. of Quincy*, 159 Mass. 505. It was enough

for him to satisfy the jury that the directors had in fact constituted Leavitt managing director or agent in general control of the ordinary business of the corporation, with ostensible authority, among other things, to employ a manager for the bowling alleys. And the evidence warranted a finding that the corporation held out Leavitt as one having authority to bind it by contracts of employment such as were necessary or within the ordinary province of the business of maintaining a bowling alley. The employment of a manager was presumably necessary for the carrying on of this business; and it is not suggested that the corporation made any arrangement for hiring one except what it did through Leavitt. It cannot be said, as matter of law, that the terms of this contract, which induced the plaintiff to give up his former position were unusual or unnecessary. On the evidence, including the habitual exercise by Leavitt of the powers of managing director or general agent, with the knowledge and implied assent of the other directors representing the corporation, the plaintiff was entitled to go to the jury on his allegation that Leavitt did have implied authority from the corporation to employ him as manager for one year. *Bates v. Keith Iron Co.* 7 Met. 224. *Fay v. Noble*, 12 Cush. 1. *Lester v. Webb*, 1 Allen, 34. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 285. *Parrot v. Mexican Central Railway*, 207 Mass. 184.

Exceptions sustained.

JACOB CINAMON vs. ST. LOUIS RUBBER COMPANY & trustee.

Suffolk. November 7, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Judgment, Special. Res Judicata. Surety. Election.

On a motion for a special judgment against a bankrupt defendant to enable the plaintiff to bring an action against the sureties on a bond given by such defendant to dissolve an attachment of funds in the hands of a trustee summoned by trustee process, it is no bar to the granting of the motion that the plaintiff also made an attachment by special precept of personal property of the bankrupt defendant, which attachment was released on the giving by the defendant of another bond with sureties, and that the plaintiff, without filing this last named

bond, had made a motion for a special judgment relying upon it as a common law bond and that the motion was denied, the two bonds being independent and having vested in the plaintiff two distinct and separate causes of action, and the denial of the motion for a special judgment on the common law bond having been an interlocutory order within the discretionary power of the judge which did not affect the merits of the controversy nor bind the parties in all subsequent proceedings until reversed or modified.

Upon the motion described above, where the two bonds mentioned created independent liabilities and the sureties upon them were not the same, it was *said*, that the remedies on the two bonds were not inconsistent and that the plaintiff had a right of action upon each of them, but that, if they had been inconsistent and the plaintiff had been mistaken in supposing that he had two such rights and had chosen the one to which he was not entitled, this would not bar him from exercising the other right if he was entitled to it.

CONTRACT against the St. Louis Rubber Company a corporation, the Paul Revere Trust Company being summoned as trustee, for an alleged wrongful discharge under a contract of employment. Writ dated November 11, 1914.

On October 29, 1915, the plaintiff obtained a verdict for \$780. The defendant was adjudicated a bankrupt on May 15, 1916, and was discharged in bankruptcy on November 29, 1916. On February 7, 1917, the plaintiff filed a motion for a general or special judgment against the bankrupt to enable the plaintiff to bring an action against the sureties on a bond which was given by the bankrupt to dissolve an attachment made by the trustee process. The sureties on the bond were permitted to intervene and object to the allowance of the motion. The motion was heard by *Lawton, J.* The material facts and proceedings are stated in the opinion.

The sureties asked the judge to make the following rulings:

"1. The plaintiff could have asked the judge, at the hearing on the first motion for a special judgment, to grant such judgment on the second or statutory bond.

"2. It was the duty of the plaintiff to introduce all his evidence and reasons for the granting of a special judgment at the hearing on the first motion for a special judgment.

"3. The plaintiff's failure to request the judge to grant a special judgment on the second or statutory bond at the hearing on the plaintiff's first motion for a special judgment is a bar to any subsequent motion by the plaintiff for a special judgment.

"4. That part of the motion filed on February 7, 1917, which

asks for a special judgment, is now *res judicata* because of the order denying a special judgment.

"5. The plaintiff having stated in open court, at the hearing on the first motion, that he desired a special judgment on the common law bond rather than on the statutory bond, such action is an election of remedies on his part.

"6. The plaintiff having stated in open court that he desired a special judgment on the common law bond, he must be deemed to have waived his right to ask for a special judgment in the second or statutory bond."

The judge refused to make any of these rulings and made the following memorandum of decision:

"It is this order of January 26, 1917, denying the motion for special judgment that, the sureties assert, makes the present motion for special judgment *res judicata*. They have filed six requests for rulings, which are annexed hereto. I ruled that the order denying the first motion is not a final judgment or decree, but is in the nature of an interlocutory judgment, decree or order, and refused the sureties' requested rulings, the first and second being refused as immaterial. To the foregoing ruling and refusals to rule, the sureties seasonably saved their exceptions."

At the request of the counsel for the sureties the judge reported the case for determination by this court. If the rulings and order were correct, special judgment was to issue as ordered; otherwise, the motion was to be denied.

The case was submitted on briefs.

D. Stoneman, A. I. Stoneman & A. G. Gould, for the sureties.

J. E. Kelley & D. Flower, for the plaintiff.

CROSBY, J. The plaintiff obtained a verdict against the principal defendant in an action brought to recover damages arising from a wrongful discharge under a contract of employment. The facts may be briefly stated as follows: The Paul Revere Trust Company was named as trustee, and its answer disclosed funds belonging to the principal defendant. The defendant filed a bill of exceptions, which was allowed, but was dismissed on January 2, 1917. On February 11, 1916, the defendant gave a bond with sureties to dissolve the attachment of funds in the hands of the trustee, which bond was approved by a master in chancery and was filed in court on February 12, 1916. On May 15, 1916, the

defendant was adjudicated a bankrupt; it was discharged in bankruptcy on November 29, 1916.

The report of the judge contains the following statement: "After the verdict, the plaintiff obtained a special precept of attachment, January 26, 1916, under which personal property was attached. On the defendant's promise to give a bond, the attachment was ordered dissolved by the plaintiff. The bond not being furnished, a second special precept was asked and issued February 7, 1916. The defendant thereupon gave to the plaintiff a bond with sureties, and on the plaintiff's order the attachment was released by the officer. This bond was retained by the plaintiff, but was not filed in court. On January 15, 1917, the plaintiff filed a motion for special judgment. In support of his motion, he stated orally that he relied on this last named common law bond, and produced it and offered it in evidence in court. He did this under a misapprehension on his part that the said bond was the one given to dissolve the attachment by trustee process on the fund in the Paul Revere Trust Company's hands. On said motion, the following order was indorsed, after hearing: 'Jan. 26, 1917. Denied after hearing.'" The plaintiff appealed and excepted to the order denying the motion, but on May 12, 1917, he waived the appeal and claim of exception.

On February 7, 1917, the plaintiff filed a motion for a general or special judgment against the bankrupt to enable the plaintiff to bring an action against the sureties on the statutory bond given to dissolve the attachment of the funds in the hands of the trustee. The sureties, who had been allowed to intervene and who had suggested the bankruptcy of the principal defendant, opposed this motion, and contended that the denial of the motion for a special judgment on the common law bond was *res judicata* and a bar to an action upon the statutory bond.

The judge of the Superior Court by whom both motions were heard, ruled "that the order denying the first motion is not a final judgment or decree, but is in the nature of an interlocutory judgment, decree or order, and refused the sureties' requested rulings." To this ruling and to the refusal of the judge to make the rulings requested by them the sureties excepted.

The ruling of the presiding judge was correct. The plaintiff held two bonds each given to him by the defendant to release

attachments that had been made upon the writ. These bonds were separate and independent instruments and vested in the plaintiff two independent and distinct causes of action. The denial of a motion made under R. L. c. 177, § 25, for a special judgment upon the common law bond was a decision upon an interlocutory matter and was addressed to the sound discretion of the judge. The ground for the denial of this motion does not appear in the record, but, whether due to the failure of the plaintiff to prove the execution of the bond or for any other reason, it is plain that it cannot be regarded as a final adjudication upon the merits and binding upon the parties in all subsequent proceedings, unless reversed or modified. There would seem to be no legal objection to the allowance by the judge for proper cause of the renewal of a motion previously denied. *Waucantuck Mills v. Magee Carpet Co.* 225 Mass. 31. *Riggs v. Pursell*, 74 N. Y. 370.

In order that the doctrine of *res judicata* may apply as a bar to a subsequent proceeding, it must appear, either from the record alone or from the record supplemented by other evidence, that the issue was considered and determined by the court upon the merits. *Foye v. Patch*, 132 Mass. 105. *Corbett v. Craven*, 196 Mass. 319. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41.

There would be no sense nor principle in a rule which would hold that the plaintiff by filing a motion for a special judgment upon one of the bonds is precluded from maintaining an action upon the other because the first motion had been denied. The two bonds created independent liabilities; besides, the sureties on them were not identical. Nor can the plaintiff be precluded from recovery upon the ground that by reason of filing his first motion he elected to pursue one of two alternative and inconsistent remedies. The answer to this suggestion is that the remedies were not inconsistent: he had a right of action upon each bond and now seeks to enforce his rights upon one of them for breach of its conditions. *Butler v. Hildreth*, 5 Met. 49, 50. *Whiteside v. Brawley*, 152 Mass. 133. *Snow v. Alley*, 156 Mass. 193, 195. *Northern Assurance Co. of London v. Grand View Building Association*, 203 U. S. 106, 108.

If the plaintiff's rights were alternative or inconsistent, which does not appear, and he erroneously understood he had two such rights and attempted to choose one to which he was not entitled, he is not barred from exercising the other if entitled to it. *Snow*

v. *Alley, supra.* *Doucette v. Baldwin*, 194 Mass. 131, 135. *Furber v. Dane*, 204 Mass. 412, 415.

The ruling made by the presiding judge was correct, and the requests for rulings were refused properly.

In accordance with the terms of the report a special judgment is to be entered as ordered.

So ordered.

ELIZABETH M. MURPHY vs. BOSTON ELEVATED RAILWAY
COMPANY.

Middlesex. November 8, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway, Res ipsa loquitur.

Where a woman enters an electric car at an elevated terminal station, after the car has discharged a load of passengers and has passed round a loop before taking others, and finding all the windows of the car open seats herself, with no other person near her, at one of the windows with her arm resting on the window sill and, when the car has proceeded about two miles, the window falls on her elbow and injures her severely, in an action against the corporation operating the car for her injuries thus sustained, these facts afford no evidence of negligence on the part of the defendant.

The unexplained fall of a window of a passenger car which is operated on a street and elevated railway is in itself no evidence that the window was unsafe or defective or that the servants of the corporation operating the car were negligent. Following *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254.

TORT for personal injuries sustained by the plaintiff on July 14, 1914, while she was a passenger on a car of the defendant by reason of the sash of a window coming down upon her elbow when the car was passing along Boston Avenue near Tufts College in Medford and she was sitting with her arm leaning on the window sill. Writ dated July 27, 1914.

In the Superior Court the plaintiff by order of the court filed specifications, of which the essential part is quoted in the opinion. The case was tried before *Hardy, J.* The testimony of the plaintiff is described in the opinion. It is stated in the bill of exceptions that "There was no evidence as to why the window sash fell." The defendant's conductor in charge of the car at the time of the

accident testified that he examined the window after the accident and found the window catches in good condition. The defendant introduced evidence that the car was inspected the day after the accident and that all the window catches were in good order. At the close of all the evidence the judge at the request of the defendant ruled that upon all the evidence the plaintiff was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. L. Millan, for the plaintiff.

W. U. Friend, for the defendant.

CROSBY, J. The plaintiff seeks to recover for personal injuries received, while a passenger on a car of the defendant, by reason of a window falling upon her elbow. By order of the Superior Court specifications were filed by the plaintiff alleging that the negligence of the defendant, on which she relied, consisted "in the omission on the part of the defendant to provide a safe and proper window in the car, and as a result of such omission, the window fell down on the arm of the plaintiff and severely injured her."

The plaintiff boarded the car at Sullivan Square in Boston, which is known as a terminal point where all incoming passengers get off; "the car then goes round the loop and an entirely new set of passengers get on." All the windows in the car in question were open when the plaintiff boarded it at about a quarter to nine o'clock on the morning of July 14, 1914. She testified that she was the only person in the car near the window during the trip until she was injured, — about two miles distant from Sullivan Square.

There was no evidence as to what caused the window to fall, nor was there evidence to show that it was in an unsafe or defective condition. From these undisputed facts, it would seem that the plaintiff had failed to sustain the allegation that the defendant had not provided a "safe and proper window in the car." The unexplained fall of the window in itself was not evidence that it was unsafe or defective, or that the servants or agents of the defendant were negligent. *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254. *Weinschenk v. New York, New Haven, & Hartford Railroad*, 190 Mass. 250. *Hunt v. Boston Elevated Railway*, 201 Mass. 182.

If, under the specification of negligence, it is open to the plaintiff to prove that her injuries were due to the negligence of a servant of the defendant in raising the window without properly fastening it in place, still it is manifest that there is no evidence of such negligence. The contention of the plaintiff that there was evidence to indicate that the window was raised and improperly fastened in place by a servant of the defendant, and not by some person for whose act the defendant would not be responsible, cannot be sustained. The evidence that Sullivan Square is a terminal or junction point where one set of passengers alights and another almost immediately boards the cars, does not show that, in the short interval while the cars are passing round the loop, they are in the exclusive custody and control of the defendant so that the condition of the windows could be found to be due to the defendant's employees. While all the windows were open when the plaintiff boarded the car, there is nothing to show that they, or any of them, were raised by any employee of the defendant when the car passed round the loop; nor is there any evidence to show that the window in question had not been raised by a passenger, as it is apparent that the car had been in use on that morning previously to its arrival at Sullivan Square.

The case is governed in principle by *Faulkner v. Boston & Maine Railroad, supra*, and cannot be distinguished from it. See also *Weinschenk v. New York, New Haven, & Hartford Railroad, supra*; *Hunt v. Boston Elevated Railway, supra*. The cases cited and relied on by the plaintiff are clearly distinguishable from the case at bar.

Exceptions overruled.

PATRICK FITZGERALD vs. RENTON WHIDDEN & another.

Suffolk. November 12, 1917. — January 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability, In building in process of construction.

In an action, brought before the passage of the workmen's compensation act, under R. L. c. 106, § 71, cl. 2, by a laborer against a building contractor by whom he was employed for personal injuries sustained, when by order of the defendant's superintendent he was ascending a ladder between the floors of a building in process of construction carrying some heavy iron plates on his right shoulder, from having his left arm as he raised it to grasp the rung of the ladder strike an old nail that was protruding from the end of a cleat or stay that held the ladder in place and negligently had been left projecting beyond the side of the ladder instead of being cut or bevelled off, so that the plaintiff lost his balance and fell to the ground and was injured, it was admitted that it was the duty of the superintendent to inspect the ladder, which for some weeks had been attached to the structure in lieu of stairs, and to see that it was safe for the workmen to use, and it was *held*, that there was evidence for the jury that the superintendent was negligent in ordering the plaintiff to ascend the ladder with the iron plates without ascertaining the risk to which the plaintiff was exposed from the projecting cleat and nail and giving him warning of the danger in his path.

In the same case it appeared that the protruding nail was on the under side of the cleat, and it was *held* that the presence of the nail was not so obvious nor so likely to be anticipated by a workman of the plaintiff's experience as to relieve the superintendent of his duty, if he allowed it to remain, to warn the workman of its presence.

In the same case there was evidence on which it could be found that the plaintiff when injured was ascending the ladder in the ordinary manner, carrying a number of loose iron plates on his shoulder and unaware of the projecting cleat and nail until his left arm came in contact with them, and it was *held* that the question whether the plaintiff was in the exercise of due care was for the jury.

In the same case it was *pointed out* that as matter of law the plaintiff did not assume the risk of the superintendent's negligence.

TORT for personal injuries sustained by the plaintiff on May 5, 1906, when employed as a laborer by the defendants, who were building contractors, by reason of a dangerous and defective cleat to hold in place a ladder furnished by the defendants which the plaintiff was ordered to ascend in the course of his employment, the declaration containing two counts, the first at common law for negligence in setting the plaintiff at work without warning in

an unsafe and dangerous place and failing to furnish him with safe and suitable tools and appliances, and the second under R. L. c. 106, § 71, cls. 1, 2, alleging defective ways, works and machinery and negligence of a superintendent. Writ dated April 30, 1907.

The answer contained a general denial and an allegation that the danger, if any, from the ladder and its cleats was an obvious one of which the plaintiff voluntarily assumed the risk.

In the Superior Court the case was tried before *Fox, J.* The evidence is described in the opinion. Notice in accordance with the requirements of the employers' liability act was admitted. The report stated that "It was not contended that the ladder in question was defective or that there was any defect in the premises except so far as the corners of the stays being not sawed off and except so far as the nail protruding from the end of the left hand stay could be considered defects."

The judge submitted the case to the jury for the assessment of damages and they returned a verdict for the plaintiff in the sum of \$4,872.10, of which by order of the judge the plaintiff remitted all in excess of \$2,500, and by agreement of the parties the judge reported the case for determination by this court, with a stipulation that, if the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$2,500 with costs, and that, if the case should not have been submitted to the jury, judgment was to be entered for the defendants with costs.

J. J. Donahue, for the plaintiff.

L. A. Ford, for the defendants.

DE COURCY, J. The plaintiff was in the employ of the defendants, who are building contractors. At the time of the accident they were erecting and remodelling adjoining buildings on Head Place in Boston. No stairs had been constructed between the floors. A ladder extended from the ground through an opening in the floor of the second story, three and one half feet by four feet in size. For the purpose of holding the ladder securely in position two cleats or stays were nailed to the second story floor and extended over the edge of the opening at oblique angles, one on each side of the ladder. These stays were four feet five inches long, four or five inches wide, and about an inch thick.

There was evidence on which the jury could find the following additional facts: The ladder had been placed in position some weeks earlier under the direction of the boss stage builder. It was the duty of the foreman, Tiff, to inspect the ladders and stagings and to see that the stage builders did their work properly. Two fellow workmen of the plaintiff had noticed that the cleats or stays projected beyond the uprights of the ladder and were not sawed or bevelled off; and they had so reported to the foreman. While Tiff denied this, he testified that a ladder thus rigged would be dangerous and that in securing a ladder in the usual way the ends of the cleats were cut or bevelled off, so that they would not protrude beyond the edge of the ladder.

The plaintiff, in response to an urgent order of the foreman, was ascending the ladder for the first time and was carrying some iron plates on his right shoulder. These plates were nine or ten inches square and about one inch thick. The bottom edge of the plates rested on his shoulder and the top edge of one of them rested against his head. As he raised his left arm to grasp a rung of the ladder it struck the projecting corner of one of the cleats, and an old nail, which was sticking out of the under side of the cleat where it extended over the opening, tore his arm and caused him to lose his balance and fall to the ground. The nail protruded one quarter of an inch and was "bent down or turned in underneath" and the plaintiff did not notice it until after it had torn his arm.

If the jury believed the testimony most favorable to the plaintiff, they could find that the projecting ends of the cleats and the protruding nail constituted a dangerous obstruction in his pathway; that he was ignorant of this danger and that the restrained position of his head, against which the iron plates rested, prevented him from seeing what was above him. It was admittedly the duty of Tiff, the statutory superintendent, to inspect the ladder, which for some weeks had been attached to the structure in lieu of stairs, and to see that it was safe for the workmen to use. And the jury would be warranted in finding that Tiff was negligent in ordering the plaintiff to ascend the ladder with the plates and to "get them up quick," without ascertaining the risk to which the plaintiff was exposed by the projecting cleat and nail and giving him warning of the danger in his path. *Feeney v.*

York Manuf. Co. 189 Mass. 336. *Hourigan v. Boston Elevated Railway*, 193 Mass. 495. *Snow v. Revere Rubber Co.* 211 Mass. 82. *Whalen v. New England Telephone & Telegraph Co.* 228 Mass. 361, and cases cited. The presence of a protruding nail on the under side of the cleat was not so obvious nor so likely to be anticipated by a workman of the plaintiff's experience as to relieve the superintendent of this duty. *Blake v. John F. Johnston Co.* 213 Mass. 143, and *Noonan v. Foley*, 217 Mass. 566, are not here applicable.

As the plaintiff was entitled to go to the jury on the allegations, in the second count, of negligence on the part of a statutory superintendent, it is unnecessary to consider whether there was also evidence of negligence on the other grounds set forth in his declaration.

The due care of the plaintiff was for the jury. When injured he was ascending the ladder in the ordinary manner, carrying a number of loose iron plates on his shoulder and unaware of the projecting cleat and nail until his arm came in contact with them. And as matter of law he did not assume the risk of the superintendent's negligence. *Keating v. Hewatt*, 212 Mass. 577. *McKinnon v. Pitman & Brown Co.* 213 Mass. 284. *Hargrave v. American Steel & Wire Co.* 219 Mass. 6.

As the case rightly was submitted to the jury, in accordance with the report judgment is to be entered for the plaintiff in the sum of \$2,500, with costs, and it is

So ordered.

FREDERICK W. BROWN vs. C. A. PIERCE AND COMPANY,
INCORPORATED.

Middlesex. November 12, 1917. — January 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Decsit. Actionable Tort. Contract, Implied in law.

An assurance, that by putting \$300 into a "voting contest" the person to whom the statement is addressed will "win the automobile and also the grafonola that was put up as a special prize," is not a statement by words or conduct of present

or past material facts, but is a mere promise or conjecture as to future events and, if the prophecy is proved to have been a false one made with the intention to deceive and to have been relied upon, this does not give a right of action in tort for deceit.

In an action of contract for money had and received to recover the amount of a sum of money entrusted to the defendant to put into a "voting contest" on the ground that the plaintiff was induced to part with the money by misrepresentations made to him by the defendant, if it appears that the alleged misrepresentations did not relate to facts but to conjectures as to future events and would not give a cause of action in tort for deceit, the plaintiff cannot recover.

CONTRACT OR TORT, the declaration containing three counts as described in the opinion. Writ dated May 20, 1914.

The defendant demurred to the declaration. The demurrer was heard by *McLaughlin, J.*, who made an order overruling it.

Later the case was tried before *Hitchcock, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to order a verdict for it. This the judge refused to do, and he "submitted to the jury under appropriate instructions to which no exceptions were taken other than . . . to the refusal to direct a verdict for the defendant" three questions, which with the answers to them were as follows:

"1. Was Barry acting as agent of the defendant company, and engaged in the prosecution of its business in endeavoring to induce the plaintiff to obtain additional subscriptions for the newspaper published by the defendant?" The jury answered, "Yes."

"2. In endeavoring to induce the plaintiff to obtain additional subscriptions for the newspaper published by the defendant company, did Barry make to the plaintiff any representations as to existing facts, which were false, and which Barry knew to be false, with the intention that the plaintiff should act thereon as if they were true?" The jury answered, "Yes."

"3. Did the plaintiff act upon false representations made by Barry as he would not have done had he known them to be false?" The jury answered, "Yes."

The jury returned a general verdict for the plaintiff in the sum of \$595.30; and the defendant alleged exceptions.

F. M. Forbush, for the defendant.

J. W. Pickering, for the plaintiff, submitted a brief.

PIERCE, J. This is an action of contract or tort. The declaration is in three counts: the first count alleges that the defendant

through its agent, one Barry, made certain false representations which were intended to induce and did in fact lead the plaintiff to expend money in the purchase of subscriptions to a paper published by the defendant under the terms of a "voting contest;" the second count alleges that the defendant through its officers and agents conspired with sundry persons to cheat and defraud the plaintiff by means of the false representations set out in the first count and incorporated in the second count by reference thereto; the third count is an action for money had and received to the plaintiff's use. Counts one and two are alleged to be for the same cause of action, and count three "for a part of the same cause of action."

At the trial there was no evidence to warrant the allegations of the second count to the effect that the defendant by its officers and agents wrongfully conspired with sundry persons to cheat and defraud the plaintiff by means of the same representations set out in the first count. The second count therefore may be disregarded, and we proceed to a consideration of the testimony introduced in proof of the allegations contained in the first and third counts.

The evidence was sufficient to establish the agency of both Monger and Barry, should the jury believe that the "Memorandum of Agreement" was not intended to express the real agreement between the parties, but was to be a cloak or shield to protect the defendant from actions that might arise from the wrongful conduct of its agents and servants. The jury expressly found that Barry was the agent of the defendant, and it could have been found upon the testimony that Barry, to induce the plaintiff to put his money into the "voting contest," stated to the plaintiff and to the wife of the plaintiff in the presence of the plaintiff, "that the contestants was losing interest in it and it was going to be a failure;" that "they had bought all these prizes and could n't afford to give them away; . . . that somebody had got to put some money into it so they could get out of it; . . . that anybody would be a fool if they had a chance to get an automobile for \$300 and wouldn't accept the chance;" that "if I [the plaintiff] would give him a check for \$300 that night that I would win the automobile and also the grafonola that was put up as a special prize." The jury could further find that the plaintiff put \$300 and after-

wards \$240 into the contest in reliance upon the above statements of Barry, and particularly and specifically upon the statement that if he, the plaintiff, would give him, Barry, a check that night, he, the plaintiff, would win the automobile and the grafonola.

There was evidence to warrant a finding that one Monger, who had the management of the contest and who could have been found to have been the agent of the defendant, and one C. A. Pierce, the treasurer and manager of the defendant corporation, each had knowledge of the statements of Barry to the plaintiff before the \$300 and the \$240 were paid. There was no evidence of the untruth or falsity of the statement "that the contestants was losing interest in it and it was going to be a failure." The remaining statements were not of existing facts. They were at most words of intention or prophecy.

In the law of torts, the wrong of deceit consists in the false statement by words or conduct of present or past material facts, and does not consist of mere promises or conjectures as to future acts or events. *Knowlton v. Keenan*, 146 Mass. 86. *Dawe v. Morris*, 149 Mass. 188. It is plain the plaintiff was not entitled to recover on the counts in tort.

Nor can there be any recovery on the count in contract, which proceeds on the footing of a rescission of the contract which the plaintiff alleges he was induced to make by the misrepresentations set out in the count in tort. *McCusker v. Geiger*, 195 Mass. 46.

It follows that the motion to direct a verdict for the defendant should have been granted, and it is unnecessary to determine whether the demurrer was overruled rightly.

The exceptions must be sustained and judgment entered for the defendant. St. 1909, c. 236.

So ordered.

JAMES E. McMAHON'S (dependent's) CASE.

Suffolk. November 12, 1917. — January 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Dependency, Amount of compensation.

In a claim under the workmen's compensation act by the father of a deceased injured employee alleged to have been partly dependent upon his deceased son for support, it appeared that the employee was twenty-two years of age and unmarried, that he always had lived with his parents and was the oldest of six children, of whom he and his oldest sister were the only ones who worked, that his father and mother were hardworking and saving people owning some equity in the homestead and in another house, that he worked for a street railway company and previously had worked in a department store and that in both occupations he offered his mother all his earnings for the family purse, but that she took only \$5 a week, that during the last years of his life, in addition to his regular employment, he worked on the cellar of a new addition to the house, cleaned up the yard and cellar, repaired the place for the hens, fixed up things in the barn, took out the ashes and carried up all the coal and wood and occasionally, when his father was not at home, milked the cow, that he also worked at times in a cemetery, of which his father was the superintendent, and the money that he earned in this way "was turned into the house," that he seldom came home without bringing something to some one in the family, including fruit and wearing apparel, from the value of from \$1 to \$1.50 a week, and that under these circumstances he paid \$27 for the purchase of certain articles of furniture for the household. *Held*, that on these facts the Industrial Accident Board were warranted in finding that the father was partly dependent upon the earnings of his deceased son for support.

In the claim above described it appeared, in addition to the facts stated above, that the deceased employee left at his death certain saving bank deposits, including savings amounting to \$288.87 which he intended to devote in accordance with a promise to his mother toward the payment of the cost of a contemplated addition to the family house. There was nothing in the bank books nor in the hands of the father to identify the money as having been saved for the performance of this unexecuted intention. The Industrial Accident Board, in computing under St. 1911, c. 751, Part II, § 6, the amount which the father should receive as the next of kin partly dependent upon the earnings of the deceased employee for support, included this amount of \$288.87 saved by the son to devote to the improvement of the family house as part of the amount contributed by the employee to such partial dependent. *Held*, that the inclusion of this amount was erroneous, because the deposits in the savings banks remained entirely in the legal possession and control of the employee and he could do what he pleased with the money, and a finding that it was contributed by him to his father was not warranted.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the

Industrial Accident Board awarding compensation to Francis J. McMahon as the next of kin of James E. McMahon, late of Salem, dependent upon his earnings for support at the time of the injury that caused his death when he was in the employ of the Bay State Street Railway Company.

The case was heard by *Fox, J.* The evidence reported is described in the opinion. The following extracts are taken from the report of the arbitration committee:

"When the employee died, he had money in the Salem Five Cents Savings Bank, the Warren Savings Bank of Peabody, the Salem Savings Bank and the Salem Co-operative Bank, to the amount of \$338." The father testified that, as far as he knew, "the money which James had in the bank when he died belonged to him."

"That the payment to his mother of \$27 with which to buy a bed and bureau and the saving by the employee of the sum of \$288.87 toward the keeping of his agreement with his mother to pay for certain alterations which were being made upon the family home were in fact contributions toward the support of the mother, who was the custodian of the family fund and who disbursed the fund for the benefit of its members.

"That the total contribution of the employee to the support of his mother was \$315.87.

"That the annual earnings of the deceased employee during the year preceding his death were \$818.52.

"That the amount due a person wholly dependent, therefore, would be \$10, or the maximum weekly payment under the statute.

"That the amount due the partial dependent is $315.87/818.52$ of \$10 each week for a period of five hundred weeks from the date of the injury; that is \$3.86 per week for the statutory period."

The judge made a decree, in accordance with the decision of the Industrial Accident Board, that there be paid to Francis J. McMahon, administrator of the estate of James E. McMahon, a weekly payment of \$3.86 for a period of five hundred weeks from August 6, 1916, the date of the injury. The insurer appealed.

J. W. Cronin, for the insurer.

W. B. Sullivan, (*D. F. O'Rourke* with him,) for the administrator of the estate of the deceased employee.

DE COURCY, J. The deceased employee, James E. McMahon, on August 6, 1916, sustained fatal injuries arising out of and in the

course of his employment. The Industrial Accident Board found that the father, Francis J. McMahon, was partially dependent for support upon the decedent, within the meaning of Part II, §§ 6, 7, of the workmen's compensation act. The contributions for the support of the father, on which this finding was based, were two: the giving by James of \$27 for the purchase of certain articles of furniture and the alleged saving by him of the sum of \$288.87 toward the payment of the cost of certain alterations in the house "which the employee had contracted to make." We cannot consider in this connection the payment of board by the decedent nor the purchase by him of various articles of clothing and fruit and his gifts of money for car fares, because the board has found that these were not contributions to the support of the family and the claimant has not appealed from that decision. See *Gove's Case*, 223 Mass. 187, 194.

1. As to the father's dependency. "Dependents" are defined in Part V, § 2, of the statute as "members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury." The finding of the board that the father, Francis J. McMahon, was partially dependent for support upon his son James E., must stand if there was any evidence to warrant that finding. *Diaz's Case*, 217 Mass. 36. The contribution of \$27, even though given for the purchase of certain articles of household furniture, could be adjudged a contribution to the "support" of his father. And while dependency implies that the father relied on this son for support or help to a substantial degree, partial dependency within the meaning of the statute may be found to exist even though the father could have subsisted without any aid from his son and the son was under no legal obligation to furnish it. *Kenney's Case*, 222 Mass. 401. In determining whether this present of \$27 was evidence of partial dependency, the contribution must be considered in the light of the other facts before the board. The deceased was twenty-two years old, unmarried, and always had lived with his parents. He was the oldest of six children, none of whom worked except him and his oldest sister, Mary. The father and mother were hard working and saving people, with some equity in the homestead and in another house. James went to work for the street railway about the time he reached his majority, and before

that he worked in a department store. In both occupations it appears that he offered to his mother (who held the family purse) all his earnings, but she took only \$5 per week. During the last years of his life, in addition to his regular employment, "he worked on the cellar of the new addition, cleaned up the yard and cellar, fixed over the place for the hens, fixed up things in the barn, took out the ashes and carried up all the coal and wood. He milked the cow occasionally when his father was not home." He also worked at times in the cemetery, of which his father was superintendent, and the money he earned "was turned into the house. . . . He very seldom came home without bringing something to some one in the family," including fruit, wearing apparel, etc., to the value of \$1 to \$1.50 a week. When the payment of \$27 for furniture is viewed in this setting, we cannot say as matter of law that the board could not find it to be a contribution made by a son to a father who looked to that son for support and help. In other words, it cannot be ruled that the finding of a condition of partial dependency was unsupported by evidence. *Murphy's Case*, 218 Mass. 278. *Gove's Case*, *supra*. The other contribution on which the board based its decision will be considered under the next heading.

2. The existence of partial dependency on the part of the father having been established, the further question arises as to the amount to be paid to the dependent. The specific provision of our statute, Part II, § 6, as amended by St. 1914, c. 708, § 2, is as follows: "If death results from the injury, the association shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of injury, a weekly payment equal to sixty-six and two thirds per cent of his average weekly wages, but not more than ten dollars nor less than four dollars a week for a period of five hundred weeks from the date of the injury; but in no case shall the amount be more than four thousand dollars. If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury." It is agreed

that the employee earned \$818.52 during the last year of his life. To a person wholly dependent there would be due a weekly payment of \$10, or the maximum amount under the statute. The father in this case is entitled to such proportionate part of \$10 a week as the amounts received by him from James bear to said annual earnings of James.

The only undetermined element in this problem is the amount which James contributed to his father during the year. In addition to the payment of \$27 already referred to, the board found that "the saving of the sum of \$288.87 toward the payment of the cost of certain alterations on [the family] home, which the employee had contracted to make," was a contribution to the support of the dependent. As to this item, the evidence would warrant a finding that James made an oral agreement with a carpenter for certain alterations in his father's house, for \$1,200; and that before the death of James the carpenter had put \$205.05 into the house in stock and labor. But no payment ever was made by the decedent on the contract. At the time of his death he had money deposited in four banks, amounting in all to \$338. Apparently the board adopted the finding of the arbitration committee that the deceased was saving \$288.87 of this wherewith to pay for the alterations, in accordance with a promise made to his mother. But, even if we assume that this sum came from the wages of the deceased and was earned during the year preceding his injury, the money remained entirely in his legal possession and control and he could do with it what he pleased. There was nothing on the bank books nor in the father's possession to even identify the money as being saved for the performance of this unexecuted intention. In our opinion the board was not legally warranted in finding that \$288.87 of the moneys deposited in the banks was an "amount contributed" by him to his father, and it cannot be included in determining the amount payable to the dependent under § 6.

The result is that on this record the dependent is entitled to 27/818.52 (instead of 315.87/818.52) of \$10 each week for five hundred weeks from the date of the injury. The decree appealed from must be reversed, and a decree entered in accordance with this opinion.

So ordered.

RALPH R. RICE vs. LOWELL BUICK COMPANY.

LEMUEL J. STEWART vs. SAME.

CHARLES T. PURDY vs. SAME.

Middlesex. November 13, 1917. — January 2, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In use of highway. Motor Vehicle. Law of the Road.

At the trial of an action for personal injuries sustained in a collision of a motor car in which the plaintiff was travelling with another motor car driven by the defendant, after the car in which the plaintiff was travelling had come from an intersecting road and, instead of passing "to the right of the intersection of the centres of said ways before turning to the left," had turned directly to the left and was driven upon a street car track which was at the left hand side of the highway, it is right for the presiding judge to refuse to rule that, if the jury should find that the collision occurred some sixty-five feet or more from the intersection of the two roads, the law of the road contained in R. L. c. 54 applies to the case and the provisions of St. 1909, c. 534, § 14, as amended, do not apply, because the question, whose negligence caused the collision, cannot be determined without considering what occurred at the intersection of the ways and the jury may find that, if the car in which the plaintiff was travelling had passed to the right of the intersection of the centres of the ways before turning to the left, the collision would not have occurred.

In the same case it was held that it also was right for the presiding judge to refuse to rule that, if the jury should find that the car which the plaintiff was driving was at the time of the collision substantially off the travelled part of the highway and was running on the street railway track, the plaintiff was not violating the law of the road; because, if the plaintiff was driving outside the travelled part of the way, he was none the less within the terms of the statute and it was his duty to drive to the right of the middle of the travelled way if it was reasonably prudent and safe for him to do so, and that, if he was driving on the street railway track, he was so near the travelled part of the way that the driver of the defendant's car had a right reasonably to expect that he would observe the law of the road if this could be done safely.

In the same case the judge instructed the jury that, while the driver of the plaintiff's car had violated the statute, the plaintiff was not necessarily precluded from recovery, that if a man was on a highway where he should not be, that would not authorize another to run him down and that it was a question for the jury to determine, whether such an emergency existed as to show that the driver of the plaintiff's car was using the care of a reasonably prudent and careful man in being where he was when the collision occurred, and that, if it was found that he was, he could not be held to have been negligent. Held, that this was an accurate statement of the law.

THREE ACTIONS OF TORT for personal injuries, and for damage to a motor car, sustained at about half past four o'clock in the afternoon of December 12, 1915, by being run into by a motor car driven by the defendant when the three plaintiffs were travelling in a motor car owned by the plaintiff in the first case and driven by the plaintiff in the third case. Writs dated January 3, 1916.

In the Superior Court the cases were tried together before *Wait, J.* The evidence is described in the opinion. At the close of the evidence the plaintiffs asked the judge to instruct the jury as follows:

"1. If the jury find that the collision occurred some sixty-five feet or more from the intersection of Shawsheen Road with Great Road, then the law of the road, R. L. c. 54, applies to this case, and the provisions of St. 1909, c. 534, § 14, as amended, with reference to intersecting ways do not apply.

"2. If the jury find that the Ford car was substantially off the travelled part of Great Road and running on the street railway tracks at the time of the collision, then it was not contrary to the law of the road for Mr. Purdy to drive the car where he did."

The judge refused to make either of these rulings and submitted the cases to the jury with other instructions, including the instructions described in the opinion to which the plaintiffs excepted. The jury returned a verdict for the defendant in each of the three cases; and the plaintiffs alleged exceptions.

W. R. Bigelow, (*L. L. Green* with him,) for the plaintiffs.

C. S. Knowles, for the defendant.

CROSBY, J. These are three actions brought to recover for personal injuries received by the plaintiffs by reason of a collision between the Ford automobile in which they were travelling and a Cadillac automobile owned by the defendant and driven by one Young. The jury returned a verdict for the defendant in each action. The cases are before us upon the plaintiffs' exceptions to the refusal of the presiding judge to give their first and second requests and to certain portions of the charge.

The accident occurred upon a highway known as Great Road in the town of Bedford, and at a point about sixty-five feet southerly from the intersection of Shawsheen Road with Great Road.

Shawsheen Road runs in a southwesterly direction and joins Great Road. The latter highway extends north and south.

There was evidence that Great Road was fifty feet wide as laid out between the stone walls on the east and west sides; that on the easterly side of the way were the rails of a single track street railway of standard gauge; that between the easterly rail and the stone wall on the east was a grass plot; that from the westerly rail to the stone wall on the west side was about thirty-four feet, consisting of a gravel shoulder four and a half feet wide from the westerly rail to the easterly edge of macadam, then a macadam road fifteen feet wide, then a gravel shoulder on the westerly side four and a half feet wide; and from there to the west wall was a grass plot.

There also was evidence that the car in which the plaintiffs were travelling, in coming from the east, turned from Shawsheen Road to the south into Great Road when the defendant's car was proceeding along Great Road in a northerly direction. The plaintiff Purdy, who was driving the Ford car, testified that "When on Shawsheen Road about fifty feet back from the crossing, I first saw the Cadillac car some two hundred and fifty feet down Great Road in the direction of Lexington, coming at thirty miles per hour, the Ford then going at about twelve miles per hour." There was nothing to prevent the driver of each car from seeing the other car for a long distance before the collision occurred. The evidence shows that the driver of the Ford car, as he approached the crossing of the two ways, instead of passing to the right of the intersection of the centres of the ways before turning to the left, turned to the left and ran along the car track on the easterly side of the highway to the place of the collision, — about sixty-five feet from the intersection of the ways. The plaintiffs further testified that, as the Ford car turned into Great Road, the Cadillac car "swayed toward its left" — then turned to the right; and then the driver of the Ford car "turned straight to the gutter."

The defendant called as a witness the driver of the Cadillac car, who testified that when he saw the car in which the plaintiffs were travelling coming toward him on the left side of the road he did not swing his car to the left, "but after putting on the brakes went further to his right and at the time of the collision

his car swung round so that it struck the right-hand side of the Ford car with the left rear end of the Cadillac car."

The presiding judge instructed the jury as to the law relating to the duties of drivers of motor vehicles travelling upon highways, so far as pertinent to the issues involved, including the duties of the drivers of such vehicles upon approaching a crossing of intersecting ways. He also read to the jury St. 1909, c. 534, § 14, as amended by St. 1910, c. 605, § 5, and R. L. c. 54, §§ 1, 2.

It is apparent from the record that upon the issue of liability the question which the jury were called upon to decide was, whether the accident was due to the carelessness of the driver of the defendant's car or was the result of carelessness on the part of the driver of the Ford car. It could not have been ruled that, if the collision occurred sixty-five feet or more from the intersection of the ways R. L. c. 54 applied and that St. 1909, c. 534, § 14, did not apply. The question as to whose negligence caused the accident could not be determined by leaving out of consideration what occurred at the intersection of the ways, but depended upon the conduct of the parties from the time the plaintiffs entered upon Great Road down to the time of the collision. The jury might have found that if the driver of the Ford car had complied with the provisions of St. 1909, c. 534, § 14, and had passed to the right of the intersection of the centres of the ways before turning to the left, the collision would not have occurred. Accordingly the plaintiffs' first request could not properly have been given.

The language found in the opinion in *Smith v. Conway*, 121 Mass. 216, is not applicable, but was used with reference to a state of facts wholly different from what appears in the case at bar.

The plaintiffs' second request was refused rightly. If, upon conflicting evidence, the jury could have found "that the Ford car was substantially off the travelled part of Great Road and running on the street railway tracks at the time of the collision," still it could not have been ruled that it was not contrary to the law of the road to be there, under the circumstances as shown by the evidence.

These motor cars were travelling upon the highway in opposite directions and the operator of each was bound, under R. L. c. 54, § 1, to "seasonably drive his . . . vehicle to the right of the

middle of the travelled part of such . . . way" so that their respective vehicles might pass without interference. At the time of the collision, the drivers of the automobiles were attempting to pass each other while travelling in opposite directions. The driver of the plaintiffs' car was within the terms of the statute even if he was outside the travelled part of the way; it still was his duty to drive to the right of the middle of the travelled way, if it was reasonably prudent and safe for him to do so. If he was not on the travelled way, he was so near it that the driver of the defendant's car had a right reasonably to expect that he would observe the law of the road if he could prudently and safely do so.

The judge, in his instructions, told the jury in substance that, while the driver of the Ford car had violated the statute, the plaintiffs were not necessarily precluded from recovery; that, if a man was on the highway where he should not be, that would not authorize another to run him down, and that it was a question for the jury to determine whether such an emergency existed as showed that the driver of the Ford car was using the care of a reasonably prudent and careful man in being where he was when the collision occurred; and, if it was so found, he could not be held to have been negligent.

The charge fully and accurately stated the law governing the case. The exceptions taken thereto cannot be sustained. As we are unable to perceive any error in the conduct of the trial, the entry must be

Exceptions overruled.

CHARLES H. TRACEY vs. GEORGE F. BLAKE & trustees.

Suffolk. November 14, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Duty of fidelity, Commission. Broker. Practice, Civil, Attempt to open new issue. Contract, Validity. Evidence, Of value, Internal revenue stamps.

In an action to recover a commission as a real estate broker, where the declaration states that to be the ground for recovery, where also the case has been treated by the parties and by the presiding judge as an action to recover a broker's commission and not as one to recover compensation for services as a middleman, and where neither of the parties took any exception to a statement in the

judge's charge that it was "simply a case of a broker employed," the plaintiff at the argument before this court upon exceptions alleged by the defendant cannot be heard to contend that he was employed as a mere middleman and not as a broker and consequently was not subject to the rules governing the conduct of brokers.

If a broker is employed by an owner of real estate to procure an exchange of that real estate for certain real estate in another city, and procures such an exchange, but in doing so agrees, without the knowledge of either of the principals, to pay one half of his commission to the broker who represents the other party to the exchange, although not to receive any equivalent benefit from that broker, this secret agreement, which is a fraud on the party employing the other broker, makes the contract of agency one contrary to public policy which cannot be enforced, and the first broker cannot recover from his own customer his commission for procuring the exchange of real estate.

In the case above described it was *said* that it was not necessary to determine whether the contract entered into by the plaintiff with the other broker was a violation of St. 1909, c. 514, § 28, and thereby was made a criminal offence.

In the same case it also was *said*, that it was not necessary to decide, whether the United States revenue stamps placed on the deeds mutually delivered by the parties to the exchange of real estate were competent evidence of the value of the property conveyed, or whether they were admissible for any purpose.

CONTRACT by a real estate broker to recover a commission of five per cent on the sum of \$50,000 for procuring the exchange of certain real estate in Worcester, belonging to the defendant called "White Oak" and valued at that sum, for the equity in a certain apartment block in Boston belonging to one Scheffreen, who was represented in the transaction by Harriet B. Howe, another real estate broker in Worcester. Writ dated January 28, 1916.

The defendant's answer, as amended, contained in addition to a general denial the following: "And the defendant further says that if the plaintiff shall prove that the defendant employed him as his broker as set forth in the declaration, the plaintiff thereafter made a contract with the broker representing the other principal in the exchange of properties thereafter made, by the terms of which the plaintiff agreed to give to such broker a part of the commission which he might receive from the defendant, and that said contract was neither known of nor assented to by the defendant nor by the other principal, and that said contract between the two brokers was against public policy, and that the plaintiff is not entitled to recover."

In the Superior Court the case was tried before *Bell, J.* The evidence is described in the opinion. The defendant offered in

evidence two deeds, each bearing stamps of \$25, contending that the amount of the stamps placed upon the deeds by the two principals was competent evidence of the value of the property, which was to be determined as the basis of estimating the broker's commission in case the jury did not find the special contract set out in the declaration. The judge excluded the evidence, subject to the defendant's exception. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. The plaintiff having admitted that he made a contract with the broker representing the other principal by which he agreed to give to such broker, in case of an exchange, one half of any commission which he might receive from the defendant, and the plaintiff having admitted that neither principal knew about such contract between the brokers, the plaintiff is not entitled to recover.

"2. If the plaintiff made a contract with the broker representing the other side by the terms of which he, the plaintiff, was to give one half or any part of his commission to such broker, and if such contract between the two brokers was not known and assented to by the principals, the plaintiff cannot recover."

The judge refused to make either of these rulings and gave to the jury in substance the following instructions, which were requested by the plaintiff:

"The fact that the plaintiff had an arrangement with Miss Howe to divide his commission with her does not affect his rights in this case. If the jury finds that the negotiating of the exchange and the consummation of the agreement for exchange were accomplished between the principals, the defendant Blake and Mr. Scheffreen, and that the plaintiff merely brought the parties together, the plaintiff is entitled to such commission as was agreed upon between the parties, or, if the jury finds that there was no agreement, to the customary and established commission which applies to property such as the defendant Blake's was, and this, notwithstanding any agreement between the plaintiff and Miss Howe as to the division of the commission between them."

The jury returned a verdict for the plaintiff in the sum of \$2,384.78, of which, by order of the judge on a motion for a new trial, the plaintiff remitted \$525.50, leaving the verdict to stand in the sum of \$1,859.25. The defendant alleged exceptions.

G. S. Taft, for the defendant.

S. R. Jones, (*C. L. Favinger* with him,) for the plaintiff.

CROSBY, J. This is an action to recover a commission for services rendered by the plaintiff in connection with the exchange of an apartment house in Boston, owned by one Scheffreen, for certain real estate in Worcester, owned by the defendant.

The contention of the plaintiff that he was merely a middleman and not a broker cannot be sustained. The distinction between a middleman and a broker is clearly defined and has been pointed out by many decisions of this court. A middleman is not subject to the rules governing brokers. He is employed merely to bring the parties together, when each desires to exchange his property for that of the other, or where one desires to sell and the other to purchase property. In such a transaction, the services are not rendered by one acting as the agent of either party. He merely puts them in a position where they may make their own contracts, and he may later receive a commission from both. *Rupp v. Sampson*, 16 Gray, 398. The distinction between a broker employed as the agent of a person to buy, sell or exchange property, and a middleman is pointed out in *Walker v. Osgood*, 98 Mass. 348.

In the case at bar, it is plain that the plaintiff acted not as a mere middleman, but as a broker in the transaction, and was the defendant's agent. The declaration alleges that "the defendant undertook and agreed to pay to the plaintiff the usual commission for procuring a customer for or for the effecting of such exchange;" the plaintiff testified, "I was the broker representing Mr. Blake;" he introduced evidence to show the usual broker's commission for procuring a customer for such property. The judge, in his charge to the jury, treated the action as one brought to recover a broker's commission, and the bill of exceptions recites that it is an action brought for that purpose.

It is manifest that the case was treated by the parties and by the presiding judge as an action to recover a broker's commission and not for services rendered as a middleman. No exception was taken by either party to that part of the judge's charge in which he stated to the jury that it was "simply a case of a broker employed." He made no reference to the difference between a broker and a middleman. The question cannot now be raised.

The undisputed evidence shows that the plaintiff agreed to

give to the broker who acted for Scheffreen one half of his commission, although there was no agreement that the plaintiff should be paid any part of the commission which Scheffreen's broker was to receive. The agreement between the plaintiff and the broker acting for Scheffreen was not known either by the defendant or by Scheffreen. This secret agreement by which Scheffreen's broker was to get not only a commission from him but was to receive also one half of the plaintiff's commission, was a direct fraud upon Scheffreen; this fraud was participated in by the plaintiff. Whether the defendant was harmed or benefited is immaterial: such an agreement is against public policy. And while the agreement in the present case differs from the one disclosed in *Quinn v. Burton*, 195 Mass. 277, in that the plaintiff in that case was to share in the commissions paid by both parties, still in principle the cases cannot be distinguished.

The employment of the plaintiff by the defendant was such that he was bound to act with the utmost fidelity and good faith, free from any secret and fraudulent agreement which might subject him, or Scheffreen's broker, to temptation to act adversely to the interests of his employer.

The record shows that Scheffreen's broker was to receive from him a commission of \$500; that broker was to receive also one half of the plaintiff's commission, which would result in Scheffreen's broker being paid a sum very largely in excess of \$500 out of the commission to be paid by the defendant. The fact that the plaintiff was not to share in the commission which Scheffreen was to pay cannot divest the bargain of its illegal character. It was a fraudulent transaction, contrary to public policy, which would prevent the plaintiff from recovering any commission from the defendant. *Thwing v. Clifford*, 136 Mass. 482. *Quinn v. Burton*, *supra*. *Sullivan v. Tufts*, 203 Mass. 155. *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197. The case of *Alvord v. Cook*, 174 Mass. 120, is not an authority in favor of the plaintiff. The decision in that case rests upon the special contract entered into by the parties as pointed out in *Quinn v. Burton*, *supra*, and is distinguishable from the case at bar.

So far as the case of *Chase v. W. G. Veal & Co.* 83 Texas, 333, cited and much relied on by the plaintiff, is contrary to the conclusion herein reached, we cannot follow it.

In view of the conclusion reached, we need not determine whether the agreement entered into by the plaintiff with Scheffreen's broker is in violation of St. 1909, c. 514, § 28, and thereby made a criminal offence which would preclude the plaintiff from recovery.

As for the reasons stated the plaintiff cannot recover, it is unnecessary to decide whether the federal revenue stamps placed on the deeds delivered by the parties were competent evidence of the value of the property conveyed thereby, or were admissible for any other purpose.

The defendant's first request for a ruling that the plaintiff is not entitled to recover should have been given. The exceptions must be sustained and judgment should be entered for the defendant in accordance with St. 1909, c. 236.

So ordered.

JACOB NATHAN vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 14, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In use of highway, Contributory. *Motor Vehicle*. *Practice, Civil*, Exceptions.

In an action against a corporation operating a street railway for damage to a motor car belonging to the plaintiff from being run into by an electric car operated by the defendant's servants, where the defence alleged was want of due care on the part of the persons in charge of the plaintiff's car, it appeared that the plaintiff's car was being tested by two men from a garage where it had been overhauled, one of whom was driving it, and that the accident happened at the intersection of two streets. Both the men in the plaintiff's car testified that they approached the intersection at a low rate of speed, sounding a signal and looking out for electric cars. The one who was driving testified further that he knew that cars ran on the street they were approaching "and that he knew the corner in question was a dangerous one for that reason." The plaintiff then offered to show by the testimony of the same witness that as they approached this street, which was called Brookline Avenue, the other man said to him, "Look out for the Brookline Avenue cars." The trial judge excluded the evidence offered and found for the defendant. *Held*, that the exclusion of the evidence presented no reversible error of law, because the driver of the plaintiff's car had testified that he already was alert and was looking out for electric cars, so that the warning of the other man, which the

plaintiff offered to prove, was of no essential probative value and its exclusion could not have harmed the plaintiff.

TORT for damage to a motor car belonging to the plaintiff from being run into by an electric car operated by the servants of the defendant in April, 1916, at the intersection of Brookline Avenue and Emerald Street in Brookline. Writ in the Municipal Court of the City of Boston dated August 17, 1916.

The defendant's answer contained a general denial and an allegation that at the time of the accident the plaintiff was not in the exercise of due care.

At the trial in the Municipal Court the plaintiff introduced evidence tending to prove that the plaintiff's motor car had been overhauled and was being driven on a test by one Bain and one Stoner, garage men, who just before the accident were driving down Emerald Street toward Brookline Avenue, an obstructed corner; that, as they approached the intersection of Brookline Avenue and Emerald Street, an electric car of the defendant driven on Brookline Avenue approached the intersection at a high rate of speed without giving any signal of its approach and came into collision with the automobile, damaging it.

The defendant introduced evidence tending to show that the plaintiff's car approached Brookline Avenue from Emerald Street at a high rate of speed and without giving any warning of its approach and that the electric car was being operated in a careful manner.

Bain, who was operating the plaintiff's car, and Stoner, who was with him, both testified on behalf of the plaintiff, that they approached Brookline Avenue at a low rate of speed, sounding a timely signal and looking out for electric cars. Bain further testified that he knew the cars ran on Brookline Avenue and that he knew the corner in question was a dangerous one for that reason.

As further evidence tending to prove the exercise of due care on the part of the operators of the plaintiff's car, the plaintiff offered to prove by Bain that, as they approached Brookline Avenue, Stoner said to him, "Look out for the Brookline Avenue cars." This evidence was excluded by the judge. The plaintiff objected to the exclusion of this evidence and asked for a report of the case in regard to it.

The judge found for the defendant, and at the plaintiff's request reported the case to the Appellate Division.

The Appellate Division made an order vacating the finding and ordering a new trial. The defendant appealed.

R. L. Mapplebeck, for the defendant.

G. R. Farnum, for the plaintiff.

RUGG, C. J. This is an action of tort to recover compensation for damage to an automobile belonging to the plaintiff arising from a collision between it and an electric car of the defendant at the intersection of two streets. The automobile was being driven by one Bain, and one Stoner was with him. The question of fact at issue was whether the collision was due to the negligence of those in charge of the automobile or of the motorman of the car. Both Bain and Stoner testified that they approached Brookline Avenue, one of the intersecting streets, at a low rate of speed, sounding a signal and looking out for electric cars. Bain testified further that he knew the cars ran on Brookline Avenue and that he knew the corner in question was a dangerous one for that reason. As bearing upon the due care of those in charge of the automobile, the plaintiff offered to show that as they approached the intersection of the two streets Stoner remarked to Bain, "Look out for the Brookline Avenue cars." There was no reversible error in the exclusion of this offer of evidence. Whether those in charge of the automobile used due care or not in endeavoring to avoid collision with the electric car depended upon their conduct in view of all the circumstances. It did not depend upon their previous conversation. The driver of the automobile was familiar with the corner and knew that the cars ran upon the street. His testimony as to what he did shows, if believed, that he was acting in the light of his knowledge.

The case at bar is distinguishable from *Belleveau v. S. C. Lowe Supply Co.* 200 Mass. 237, 241, and *Sullivan v. Scripture*, 3 Allen, 564, because in both those cases the conduct of two people in active combination and a reliance by one upon the statements and acts of the other was involved in determining the care or negligence of each. There was co-ordination of effort by the two toward a common end, and the extent of dependence which one reasonably might place upon the other was material. In the case at bar a mere warning was given by one to the other in substance to

exercise care, when according to the testimony of each he was already alert and using his faculties to that end. Proof of that fact was of no essential probative value.

The ruling of the trial judge presented no reversible error of law and his decision ought not to have been vacated by the Appellate Division. On the finding of the trial judge judgment should be entered for the defendant in the Municipal Court. *Loanes v. Gast*, 216 Mass. 197, 199.

So ordered.

CATHERINE MACGILVRAY vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 15, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway, In subway station. *Street Railway. Carrier, Of passengers.*

Where a corporation operates a street railway that passes through subways in Boston and where at certain subway stations in the evening after the closing of the theatres there usually is a large crowd of passengers, who push and jostle one another in trying to get their respective cars, but where it does not appear that the crowd was boisterous, disorderly or violent, the existence of such a crowd so comporting itself at a subway station at this hour, even if it results in an injury to a passenger, is not evidence of negligence on the part of the corporation.

If in returning home in the evening after attending a theatre a woman gets into a dense crowd at a subway station, where she is trying to take a car, and, as she is about to step over a space twelve or thirteen inches wide between the station platform and the step of the car, she is pushed or thrown down by some person from behind into the open space and thereby is injured, this is not evidence of negligence on the part of the corporation operating the car she was attempting to board, because the corporation reasonably could not have anticipated and guarded against such an act of violence committed by one person.

The existence of a space of twelve or thirteen inches between a subway platform and a car operated in the subway which passengers are invited to enter is not evidence of negligence on the part of the operating corporation.

Where a woman passenger before stepping from the platform of a subway station to a car operated in the subway sees a space of twelve or thirteen inches between the platform and the step of the car and then is pushed into the space and injured, she cannot contend that her injury was caused by the failure of the operating corporation to warn her of the existence of the space which she noticed before her injury.

TORT for personal injuries received shortly after half past ten o'clock on the evening of March 26, 1915, in the Boylston Street subway station in Boston by reason of falling or being pushed into an open space between the station platform and the step of an electric car of the defendant which the plaintiff by the defendant's invitation was attempting to enter as a passenger. Writ dated May 14, 1915.

In the Superior Court the case was tried before *Dana, J.* The evidence is described in the opinion. Upon the evidence the judge was of the opinion that the plaintiff as matter of law was not entitled to recover and accordingly ordered a verdict for the defendant and at the request of the plaintiff reported the case for determination by this court. If the plaintiff was entitled to go to the jury, the case was to stand for a new trial; if not, judgment was to be entered for the defendant on the verdict.

R. E. Johnston, for the plaintiff.

E. P. Saltonstall, for the defendant.

CROSBY, J. The plaintiff was injured by being pushed into an open space between the station platform and the entrance to a car which she was attempting to board in the Boylston Street subway station. The accident occurred in the evening while the plaintiff was on her way home from the theatre. She testified that there was a dense crowd at the subway station when she reached there accompanied by two acquaintances, from whom she became separated. She further testified that "When she was about to get on the car, she noticed there was a space of twelve or thirteen inches wide between the subway platform and the car and, as she stepped forward to make the car step, she was pushed from behind, and thrown around, and fell into an open space between the car entrance and the subway station platform, and was injured. It was some person behind that pushed her. It was the kind of a push that pushed her down. She did not know whether the person that pushed her got on to the car. The plaintiff heard no warning of the existence of this space. . . . After the theatre she always noticed that the subway station was crowded, and that the crowd pushed and shoved for cars." A witness called by the plaintiff (who was with her at the time of the accident) testified "that there was the usual after-theatre crowd, and the usual pushing and jostling and crowding; . . . all she saw was the people

trying to work their way through the crowd and trying to get their car; that the station master came from the front end of the car, pushing his way through the crowd; . . . that she had been at the Boylston Street subway station on other occasions after the theatre and it was usually the same, that is, the crowds were pushing and jostling and crowding."

The defendant as a carrier of passengers for hire was bound to exercise the highest degree of care, consistent with the nature and extent of its powers to protect the plaintiff from all dangers that were naturally and ordinarily to be expected. It was also its duty to use proper precautions to protect her from injury caused by the misconduct of other passengers which ought reasonably to have been anticipated and guarded against.

While there was evidence that there was a large crowd at the subway station on the evening in question, that alone is not evidence of negligence of the defendant. It is a matter of common knowledge that the subway stations along the defendant's railway are frequently crowded; such conditions are unavoidable in view of the nature and extent of the defendant's business. There also was evidence to show that on this occasion there was crowding, pushing and jostling; but there is bound to be crowding, pushing and jostling where a large number of persons are at such a station, each endeavoring to get a car which will carry him to his destination.

The evidence in this case is not of such a character as to show any conduct on the part of the passengers which the defendant should have anticipated and guarded against. Unlike the case of *Danovitz v. Blue Hill Street Railway*, 218 Mass. 42, and other cases relied on by the plaintiff, there was nothing to indicate that on this occasion the crowd was boisterous, disorderly, or violent; accordingly there was no evidence of negligence in this respect on the part of the defendant.

The case at bar is governed by cases like *McCumber v. Boston Elevated Railway*, 207 Mass. 559, *Jackson v. Boston Elevated Railway*, 217 Mass. 515, *Gasciewicz v. Boston Elevated Railway*, 222 Mass. 266. Such cases as *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341, *Beverley v. Boston Elevated Railway*, 194 Mass. 450, *Collins v. Boston Elevated Railway*, 217 Mass. 420, are not applicable upon the facts as presented by this record.

Upon the evidence most favorable to the plaintiff, it conclusively appears that she was injured (as she testified) by being pushed and thrown down by some person from behind. It is plain that such an act of violence committed by a single individual could not reasonably have been anticipated and guarded against by the defendant, and therefore is not evidence of its negligence. *Glennen v. Boston Elevated Railway*, 207 Mass. 497. *Eaton v. New York, New Haven, & Hartford Railroad*, 227 Mass. 113.

The existence of a space twelve or thirteen inches wide between the subway platform and the car is not evidence of negligence. *Willworth v. Boston Elevated Railway*, 188 Mass. 220. *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14. *Plummer v. Boston Elevated Railway*, 198 Mass. 499. *Seale v. Boston Elevated Railway*, 214 Mass. 59. The space was in plain sight and could be seen by any person attempting to board the car. The plaintiff testified that as she was about to get on the car she noticed the space. Under these circumstances, if the defendant failed to warn the plaintiff of the danger, such failure could not be found to have contributed to the accident. It follows that, if the plaintiff was not warned of the danger, that fact was not evidence of negligence of the defendant. *Altavilla v. Old Colony Street Railway*, 222 Mass. 322.

In accordance with the terms of the report, the entry must be
Judgment for the defendant on the verdict.

WILLIAM H. WRIGHT vs. IDA S. GRAUSTEIN & trustees.

Suffolk. November 15, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Abatement. Jurisdiction. Venue. Trustee Process. Municipal Court of the City of Boston.

A motion by a plaintiff in an action at law "to overrule" an answer in abatement filed by the defendant is irregular. The proper procedure is to have the case set down for hearing on the answer in abatement.

On a hearing upon an answer in abatement, where the plaintiff does not admit the facts stated in such answer, the defendant must prove the allegations in the ordinary way, and it is error for a trial judge to sustain an answer in abatement

upon a mere offer of proof by the defendant, treating it as the equivalent of evidence.

In an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the writ and declaration show that the plaintiff is a resident of another State and the defendant is a resident of Cambridge and that the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, it is no ground for the abatement of the writ that this trustee, whose residence gives jurisdiction, has no effects or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith.

In the case stated above it was *said* that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected.

Under St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4, there is no limitation upon the kind of question of law which may come to this court by an appeal from an order of the Appellate Division of the Municipal Court of the City of Boston.

CONTRACT by William H. Wright of Westminster in the county of Windham in the State of Vermont against Ida S. Graustein of Cambridge, the Charlestown Trust Company, a corporation established under the laws of this Commonwealth and having a usual place of business in Boston, and the Westminster National Bank, a corporation established under the laws of the United States and having a usual place of business at Gardner in the county of Worcester, being summoned as trustees. Writ in the Municipal Court of the City of Boston dated October 5, 1916.

The defendant filed the following answer in abatement: "Now comes the defendant in the above cause of action and says that she is a resident of Cambridge, Massachusetts, Middlesex County; that she has no money and never has deposited any in the Charlestown Trust Company, alleged trustee, nor has she ever had any business transactions with the Charlestown Trust Company."

The plaintiff filed a motion to overrule the defendant's answer in abatement. The hearing upon the motion is described in the opinion. The trial judge denied the motion and sustained the answer in abatement. At the request of the plaintiff the judge reported his decision to the Appellate Division.

The Appellate Division ordered that the order sustaining the answer in abatement be vacated and that the answer in abatement be overruled. The defendant appealed.

W. A. Graustein, for the defendant.

F. W. Campbell, for the plaintiff.

Rugg, C. J. This is an action of contract commenced by trustee process in the Municipal Court of the City of Boston. Neither the plaintiff nor the principal defendant are alleged in the writ to reside within the jurisdiction of that court, but the Charlestown Trust Company, one of the corporations named as trustee, is alleged to have its usual place of business within the jurisdiction of that court. The principal defendant filed an answer in abatement, averring in substance that she has no money on deposit with the Charlestown Trust Company and has never had any business transactions with it, and calling attention to the fact that on the allegations of the writ the plaintiff was a resident of Westminster in the State of Vermont, and the defendant, of Cambridge in this Commonwealth, and praying that the writ abate. This was described rightly as an answer in abatement. *Young v. Providence & Stonington Steamship Co.* 150 Mass. 550, 554.

The plaintiff filed a motion to overrule "the defendant's answer in abatement." This was irregular. All that was necessary was to set the case down for hearing on the answer in abatement. *Comstock v. Livingston*, 210 Mass. 581.

On the hearing upon the matter in abatement "no witnesses were sworn, and no evidence was offered in behalf of the defendant. The defendant appeared by her husband, who offered to prove to the court that the defendant did not then have, and never had, any money deposited in the Charlestown Trust Company, nor had she ever had any business transactions with the Charlestown Trust Company. The defendant made no further offer of proof." Thereupon the court sustained the answer in abatement. This was error. The plaintiff does not appear to have consented to this course of procedure, nor to have agreed that the facts stated in the offer of proof were true or might be regarded by the court as the equivalent of evidence. The plaintiff had a right to have the witnesses called and to cross-examine them if he desired. There is nothing to show that he waived that right. This is quite different from an offer of what a party expects to prove when on objection his questions to a witness are excluded. *Cook v. Enterprise Transportation Co.* 197 Mass. 7, 10. *Hallwood Cash Register Co. v. Prouty*, 196 Mass. 313, 315.

If, however, the facts stated in the offer be taken as true, then the order was wrong as matter of law. There is nothing in the record to show that the plaintiff inserted the name of the Charlestown Trust Company as trustee in bad faith having no reason to believe that it had in its hands goods, effects or credits of the principal defendant, or that the insertion of the name of that trustee was simply colorable for the purpose of appearing on the face of the writ to confer jurisdiction upon the Municipal Court of the City of Boston. Doubtless, if it were found as a fact that the joinder of the trustee was fraudulent or colorable and simply for the purpose of obtaining jurisdiction, the defendant upon seasonably raising the point would be protected. *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176. *Chesapeake & Ohio Railway v. Cockrell*, 232 U. S. 146, 152. The offer of proof did not include any element of that character.

The mere fact that one named as trustee is discharged, when the only ground for jurisdiction of the court is the residence of one named as trustee, does not deprive the court of jurisdiction provided service has been made upon the principal defendant such as would be sufficient in a common writ. The bald circumstance, that the court would not have had jurisdiction if no trustee had been named, does not deprive a court of a jurisdiction acquired solely by reason of the insertion in the writ of one as trustee who subsequently is discharged as trustee. That precise point was decided in *Bellknap v. Gibbens*, 13 Met. 471, 475, when the statute was substantially the same as now. *Lucas v. Nichols*, 5 Gray, 309. *Raymond v. Butterworth*, 139 Mass. 471. It was said by Chief Justice Shaw in *Brown v. Webber*, 6 Cush. 560, 569, 570: "the county in which a writ is to be returned is fixed by the place of a trustee or trustees named in the writ, and will not be changed by the fact that the trustees are afterwards discharged. It also follows, that if neither plaintiff nor defendant lives in the county where the writ is returned, or in a county where a trustee named in the writ lives, and though such trustee is discharged, the suit is rightly brought in such county, and may, after the discharge of the trustee, be prosecuted against the principal defendant, if such service has been made on him as would be legal, if the suit have been commenced by a common writ."

Although questions of law arising on answers in abatement

formerly could not be brought here from the Superior Court, that now has been changed, *Potter v. Lapointe Machine Tool Co.* 201 Mass. 557, 559, and there is no limitation on the kind of question of law which may come here from the Municipal Court of the City of Boston. St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4.

The result is that the answer in abatement set forth no ground in law for the abatement of the proceeding. The order of the Appellate Division was right and is

Affirmed.

ROBERT J. DOOLEY vs. CHARLES F. MURPHY.

Suffolk. November 16, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Municipal Court of the City of Boston, Appeal. Pleading, Civil, Declaration. Set-off.

In an action of contract on an account annexed for services rendered, brought in the Municipal Court of the City of Boston, after the case has been reported to the Appellate Division and an appeal from the order of the Appellate Division has been taken to this court, the defendant cannot in this court set up for the first time the defence that the plaintiff cannot recover on an account annexed because there was a special contract between the parties in regard to the plaintiff's services.

Under R. L. c. 174, § 11, which provides that "Judgment in an action in which a declaration in set-off has been filed shall be rendered in favor of the party to whom a balance is found due for the amount of such balance," in an action of contract on an account annexed for services rendered, where the defendant has filed a declaration in set-off for services alleged to have been rendered to the plaintiff by the defendant and the evidence is conflicting, and where the judge who hears the case finds in favor of the plaintiff for substantially the full amount of his claim, this is equivalent to a finding that the defendant is entitled to recover nothing on his declaration in set-off.

CONTRACT by a constable against an attorney at law on an account annexed for \$119.59 for services rendered. Writ in the Municipal Court of the City of Boston dated May 19, 1916.

The defendant's answer as amended contained a general denial and further alleged that before "the bringing of this action the plaintiff and the defendant had an accounting together at which time there was found due the plaintiff a balance of \$24."

The defendant also filed a declaration in set-off on an account

annexed for \$150 for services rendered by the defendant to the plaintiff. At the trial in the Municipal Court the evidence, as stated in the opinion, was conflicting. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That upon all the evidence the plaintiff is not entitled to recover.

"2. That upon all the evidence the defendant Murphy is entitled to recover on his declaration in set-off.

"3. That the plaintiff cannot recover an amount greater than was found due by the parties in their accounting together."

The judge found for the plaintiff in the amount claimed. He refused to make the rulings one and two and denied the third ruling because "I do not find that an accounting was made."

At the defendant's request the judge reported the case to the Appellate Division. The Appellate Division made an order dismissing the report and the defendant appealed.

After the order of the Appellate Division and before judgment, the defendant, "acting upon the suggestion contained in the opinion of the Appellate Division," moved that the case might be reopened for the purpose of a hearing on the question of damages. This motion was granted by the trial judge, who after a hearing assessed the damages in the sum of \$112.59. The defendant, without waiving his former appeal, filed another appeal from the order of the Appellate Division dismissing the report after the reduction of the damages.

R. L. c. 174, § 11, is as follows: "Judgment in an action in which a declaration in set-off has been filed shall be rendered in favor of the party to whom a balance is found due for the amount of such balance, not exceeding the jurisdiction of the court or trial justice, with costs. If the amounts found due to the respective parties are equal, judgment shall be rendered in favor of each for such amounts and an entry shall be made that the judgments are satisfied by the set-off, with costs to either party, or without costs, as the court orders. If, on the set-off in an action upon a claim assigned to the plaintiff before action is brought, a balance is found due to the defendant, or if a balance is found due from any person other than the plaintiff, judgment shall not be rendered against the plaintiff for the balance."

The case was submitted on briefs.

C. F. Murphy, pro se.

M. J. Doyle, for the plaintiff.

CROSBY, J. This is an action brought by a constable against an attorney at law to recover fees for services rendered by the plaintiff to the defendant. The defendant filed a declaration in set-off in which he alleged that the plaintiff owed him \$150 for services rendered.

The case was tried before a judge of the Municipal Court of the City of Boston, who found for the plaintiff in the sum of \$119.59, the full amount claimed. Subsequently the case was reported to the Appellate Division, which dismissed the report. After the entry of the order by the Appellate Division dismissing the report, the defendant's motion to reopen the case for further hearing upon the question of damages was allowed by the trial judge; and after further hearing he assessed the damages in the sum of \$112.59.

The defendant's first request, "That upon all the evidence the plaintiff is not entitled to recover," could not properly have been given. If the defendant relied on a special contract made with the plaintiff, he should have raised that question in the Municipal Court; it cannot be presented for the first time in this court. Besides, the defendant admitted he owed the plaintiff \$24. Plainly this request could not properly have been given.

The defendant's second request, "That upon all the evidence the defendant Murphy is entitled to recover on his declaration in set-off," also was refused rightly. Whether the defendant was entitled to recover upon his declaration in set-off, depended on the facts as found by the trial judge upon conflicting evidence. Apparently, the judge believed that the demand pleaded in the set-off was without merit and disallowed it. The general finding in favor of the plaintiff for substantially the full amount of his claim disposes of the declaration in set-off and is equivalent to a finding that the defendant is not entitled to recover thereon. R. L. c. 174, § 11. *Sargent v. Fitzpatrick*, 4 Gray, 511, 514.

The defendant waives his third request.

Let the entry be

Order dismissing report affirmed.

SAMUEL KUMIN vs. IDA S. FINE & others.

SAME vs. MAURICE FINE & others.

Worcester. November 19, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Self-serving statements, Letters. *Letters*. *Practice*, Civil, Discretionary power of judge. *Witness*, Cross-examination.

In an action of contract letters written by the plaintiff to one of the defendants, which were not a part of a mutual correspondence between the parties and were not in reply to any communication from the defendant to whom they were addressed and were not referred to afterwards in any conversation between the parties and which remained unanswered, cannot be put in evidence by the plaintiff, being excluded properly as self-serving statements.

Upon the cross-examination as a witness of one of the parties to an action at law the exclusion of questions which properly may be regarded as immaterial and as having a tendency to raise collateral issues is within the discretionary power of the presiding judge.

TWO ACTIONS OF CONTRACT, each on a promissory note payable to the plaintiff and signed by the defendant Barnard Kaplan as maker and by the defendants Maurice Fine, Ida Fine and Sarah F. Kaplan, as indorsers, one a four months' note dated April 25, 1912, for \$2,500 and the other a four months' note dated July 24, 1912, for \$4,900. Writs dated respectively September 25 and October 25, 1912.

In the Superior Court the cases were tried together before *White*, J. The judge excluded certain evidence offered by the plaintiff as described in the opinion.

At the close of the evidence the judge submitted to the jury the following question:

"Did the defendants Fine sign the two notes set out in the plaintiff's declaration at the request of and for the accommodation of the plaintiff?" The jury answered, "Yes." The judge then ordered verdicts for the defendants Fine; and the plaintiff alleged exceptions.

The cases were submitted on briefs.

G. A. Drury, F. A. Walker & J. F. Humes, for the plaintiff.

T. H. Sullivan & G. A. Gaskill, for the defendants Fine.

CROSBY, J. These are two actions of contract, tried together, to recover the amount of two promissory notes given by the defendant Barnard Kaplan to the plaintiff and indorsed by the other defendants. The notes were given in renewal of previous notes given by the defendants to the plaintiff.

The defendants Fine contended that when the original notes were given they indorsed them for the accommodation of the plaintiff, and that, in consideration of such indorsements of the notes and of the renewals, the plaintiff agreed that he would hold them harmless. The jury, in answer to a special question submitted to them, found that the notes declared on were signed by the defendants Fine at the request and for the accommodation of the plaintiff.

The plaintiff offered in evidence four letters written by him to the defendant Maurice Fine. They were excluded by the presiding judge, subject to the plaintiff's exception. It appeared that notes in renewal of previous notes indorsed by the defendants Fine were given to the plaintiff after the receipt of all the letters. It was agreed that no reply was made to any of the letters, each of which in substance stated that the plaintiff would look to the defendant Maurice Fine for payment of the note therein referred to, if it was not paid by Kaplan, the maker. These letters, written before the notes declared on were indorsed by the defendants Fine, plainly were inadmissible, although we do not mean to intimate that they would have been competent if written afterwards.

The rule is well established that a person to whom a letter is addressed ordinarily is not required to make any reply, and failure to answer it is no evidence of the truth of the facts therein stated, because such evidence would be in violation of the rule that a party cannot make evidence for himself by his own declarations. It was held in *Wiedemann v. Walpole*, [1891] 2 Q. B. 534, that in an action for breach of promise of marriage the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not corroborative of the plaintiff's testimony in support of such promise.

In the case at bar, the letters offered in evidence were not a part of mutual correspondence between the parties relating to the notes, and were not in reply to any communications written

by the defendant Maurice Fine; nor does it appear that the letters or their contents were ever referred to in any subsequent conversations between the parties. That such evidence is inadmissible has often been held by this court. *Smith v. Abbott*, 221 Mass. 326, 331. *Pye v. Perry*, 217 Mass. 68. *Callahan v. Goldman*, 216 Mass. 234. *Percy v. Bibber*, 134 Mass. 404. *Fearing v. Kimball*, 4 Allen, 125.

The plaintiff saved eleven exceptions to the exclusion of questions put to the defendant Maurice Fine in cross-examination, the first three of which are waived; we have examined the others in connection with all the evidence printed in the record, — to consider them separately would serve no useful purpose, — and we are satisfied that the questions called for evidence which would not have assisted the jury in deciding whether the defendants Fine were or were not accommodation indorsers, which was the only question in the case. The evidence therefore was immaterial and besides would have had a tendency to raise collateral issues. It was excluded rightly.

Let the entry be

Exceptions overruled.

ALBERT S. APSEY & another, trustees, vs. KATHERINE C. NASH
& others.

Suffolk. November 21, 1917. — January 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Deed. Easement. Way, Private.

A grant of an easement in land cannot be created by implication from the words of a deed or indenture or from the conjectured wishes of the parties where the easement is not conveyed by words of grant and inheritance.

PETITION, filed in the Land Court on June 23, 1916, to register the title to a parcel of land bounding southerly on Eliot Street in Boston and including the southerly portion of what is known as Boylston Place, as more fully described in the opinion, alleging the non-existence of any rights or easements of the respondents in the petitioners' portion of Boylston Place other than a right of drainage.

The case was heard by *Davis, J.*, who made the findings quoted in the opinion and ruled that the respondents had of record no rights or easements in the part of Boylston Place included in the petitioners' land other than the right of drainage granted by a certain indenture of 1853. The respondents alleged exceptions to this ruling.

A copy of a plan or diagram, which was annexed to the bill of exceptions as an exhibit, is printed on page 79. On this diagram the locus is marked by that word and the lots which were owned by the parties to the indenture of 1853 other than one Brackett and which were alleged by their owners to be dominant tenements are marked with the letter D.

R. W. Hale, for the respondents.

A. S. Apsey, (*L. L. Green* with him,) for the petitioners.

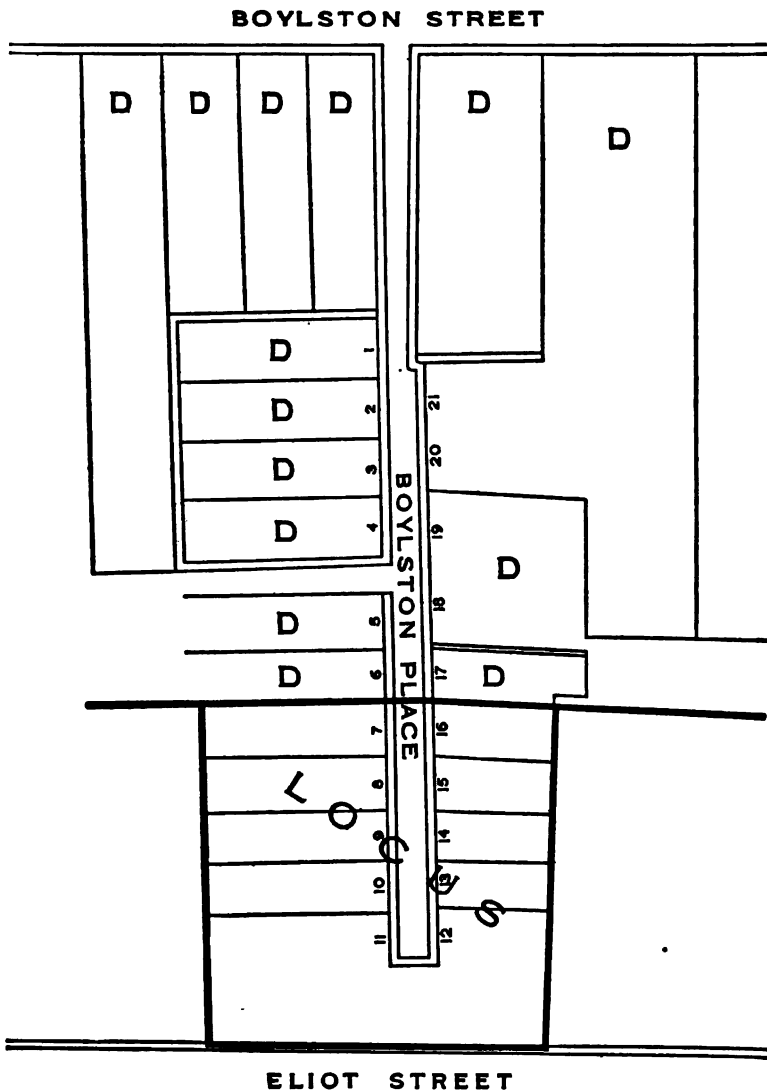
PIERCE, J. This is a petition for registration of title to a tract of land on Eliot Street in Boston, including the southerly portion of what is now known as Boylston Place. The respondents are the owners of the land on either side of that portion of Boylston Place which extends from the land of the petitioners northerly to Boylston Street. They have a right of drainage through the land of the petitioners to Eliot Street, which is admitted, and they further claim as appurtenant to their several estates a right of free passage over that portion of the petitioners' land which lies under Boylston Place as it now exists, and to have said portion remain open, unbuilt on and unobstructed. The petitioners deny the existence of any rights or easements in their portion of Boylston Place other than the right of drainage.

The following statements are taken from the decision of the judge of the Land Court:

"In 1853 Boylston Place extended southerly as far as the land now of the petitioners. On either side of it were dwelling houses of a high class, the only access to which was from Boylston Street through Boylston Place. At the southerly end of Boylston Place was a high brick wall closing the place at that end and preventing any access to it from Eliot Street. The land now belonging to the petitioners was owned by one Brackett.

"On September 30, 1853, the owners of the land on either side of Boylston Place as it then existed entered into an indenture with Brackett, by the first clause of which they granted to Brackett

as appurtenant to so much of his estate on Eliot Street as lay northerly of a line forty feet distant northerly from and parallel



to the northerly line of Eliot Street, a free right of way and passage, in common with them and their heirs and assigns, over Boylston Place to and from Boylston Street. Then followed this provision: 'The Carriageway & the Sidewalks in said Place to be

used as such and in no other manner and as the same now exist and to be continued of uniform width by said Brackett.' In a new paragraph the indenture then provided that the conveyance was made on condition: First, that Boylston Place be continued and made up to said line forty feet distant from Eliot Street at the sole cost of said Brackett; that the same never be continued through to Eliot Street with his aid or consent or with the aid or consent of his heirs or assigns; that Brackett build a brick building opposite the end of said Place fronting on Eliot Street at least three stories high and without any doors opening on to, or passageways leading therefrom into, Boylston Place, the object being to prevent as far as possible a street or common passageway from being ever made over Boylston Place to connect Boylston Street with Eliot Street or any passageway between them. Second, that Brackett build a drain through Boylston Place and across his adjoining land into the common sewer in Eliot Street for the use of the Boylston Place estates, and in consideration of the premises the right to drain said estates through said drain, 'is hereby conveyed by said Brackett, to the parties of the first part and their respective heirs and assigns in fee simple,' the expenses of entering the drain to be equitably assessed on the parties using the same. Third, that Brackett also erect fronting on said Place as continued ten brick dwelling houses, five on each side, of good style and of similar class to those already fronting on said Place; that no materials for building the same be carried over the Place, and until such houses be ready for occupancy that the brick wall at the foot of the then existing Place should not be removed; and that until all of the houses should be erected every vacant lot should be suitably fenced so as to effectually exclude all passage from the same over Boylston Place, 'so that none but the occupants of the new buildings, so to be erected on said Place shall ever be able to avail themselves of any of the privileges hereby conveyed.'

"Said houses were duly erected and the carriageway and sidewalk extended, as called for by the indenture, and a plan showing said house lots, with Boylston Place so extended and the houses and stores standing on Brackett's remaining land on Eliot Street, was recorded in the registry of deeds. On March 1, 1856, Brackett conveyed to one Mason the five house lots on the easterly side of

Boylston Place as extended, describing them as bounded westerly by the easterly line of Boylston Place, and granting 'the right in common with the other tenants [in Boylston Place] of ingress and egress in the use of said Place sidewalks and drains paying a just proportion of the repairs as reserved in an Indenture' of 1853 aforesaid. Four of these house lots were substantially re-purchased by said Brackett in 1864, and the fifth, by the trustees under his will, in 1877.

"In 1865 a further indenture was made between the same parties, reciting the indenture of 1853 by which Brackett was excluded from any right of way or access over Boylston Place to any part of the premises owned by him on the northerly side of Eliot Street within a line forty feet distant therefrom, and providing that for the term of ten years said Brackett, his heirs and assigns, should have a free right to enter said heretofore restricted premises and the building thereon, except the basement story thereof, through the front door of the dwelling house numbered eleven on Boylston Place, which was the most southerly of the houses on the west side of the Place, so that the second story and those above it of the building on the theretofore restricted premises might be occupied as rooms in connection with the dwelling house numbered eleven Boylston Place, on the strict condition that a partition wall be constructed between the portion of the premises to which access to Boylston Place was thus given and the rest of the Eliot Street property; that the roof of the theretofore restricted premises should not be used for hanging out or drying clothes; that all means of connection or approach to the theretofore restricted premises to Eliot Street, together with the windows to the basement looking upon said Boylston Place should be walled up permanently with brick so as to effectually prevent any way or thoroughfare being established between said Eliot Street and Boylston Place. By these instruments it was clearly intended that the well known but intangible social line drawn between residents on Boylston Place and persons coming from the neighborhood of Eliot Street should be drawn with legal preciseness and physically delineated by brick and mortar."

The Land Court ruled that the respondents had no right in or over any of the Brackett land except a right of drainage in fee, and ordered a decree to issue registering the title of the petitioners

accordingly. To this ruling the respondents seasonably alleged an exception.

The decision continued as follows:

"The respondents contend that the portion of Brackett's Eliot Street property lying northerly of the forty foot line from Eliot Street thereby became permanently incorporated as a part of Boylston Place, to the advantage of all of the abutters thereon. The petitioners say that the Boylston Place owners merely granted to Brackett a definite and specific easement out to Boylston Street for the portion of his property lying north of the forty foot line, while Brackett granted to them in return an impenetrable barrier to Eliot Street, except for a specific easement of drainage; and that that is all that was done. The respondents argue with much force that the creation and permanent maintenance of Boylston Place as extended was to the obvious advantage of their estates; that the indenture of 1853 amounted to an agreement that it should be so continued, made and maintained, and that the deed to Mason of 1856 and the agreement of 1865 for a temporary annex show the practical construction put upon the matter by the parties, and constitute admissions by Brackett.

"There is no estoppel under the 1856 deed, because the title came back into Brackett and the respondents claim nothing thereunder. So far as admission is concerned, there is no punctuation in the clause that is quoted, and the phrase 'as reserved in an Indenture' of 1853 apparently qualifies the whole of it. Moreover the recital of the 'right in common with the other tenants [in Boylston Place] of ingress and egress in the use of said Place' can be construed as referring to rights in the extension in common with the tenants on its westerly side, and rights in the old part in common with all of the abutters, just as readily as it can be construed into an admission that the abutters on the northerly portion of the Place have common rights in the southerly portion. *O'Brien v. Murphy*, 189 Mass. 353-355."

At the time the indenture of 1853 was signed and executed by the predecessors in title of the petitioners and the respondents, the land of Brackett was separated from the land of Dixwell and others by a wall which was upon the southerly boundary line of Boylston Place. The estates on either side of the southerly boundary line of Boylston Place were not held as a whole by Brackett,

Dixwell, or the other parties to the indenture, severally, nor was the title thereto held by the parties to the indenture in joint tenancy or as tenants in common. Across the land of Dixwell no ancient easement of necessity existed in fact or in right as appurtenant to the lands of Dixwell and others. In these conditions, as between the parties to the indenture, no easement in fee appurtenant to the lands of Dixwell and others could in law be created by any exception or reservation in the instrument of indenture by implication from the obvious advantage to the estates or otherwise than by grant with words of inheritance. *Carbrey v. Willis*, 7 Allen, 364. *Ashcroft v. Eastern Railroad*, 126 Mass. 196.

The decision continued as follows: "The respondents argue, however, that in any event the intent is clear that the whole of Boylston Place as extended should be a passageway for the benefit of all of the abutters thereon, and rely upon *Bailey v. Agawam National Bank*, 190 Mass. 20."

It is plain that *Bailey v. Agawam National Bank*, 190 Mass. 20, is authority only for the rule that a court of equity will specifically enforce against a promissor for value, and all others having actual notice thereof, a written agreement to maintain in perpetuity a passageway over land of the promissor for the use of land sold to the promisee at the delivery of the agreement; and it is equally plain that the rule of that case does not extend to promises and agreements arising by implication merely. *Sprague v. Kimball*, 213 Mass. 380.

Exceptions overruled.

TREASURER AND RECEIVER GENERAL vs. CITY OF BOSTON.

Suffolk. December 4, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Pauper, Derivative settlement.

The provision contained in R. L. c. 80, § 6, (repealed by St. 1911, c. 669, § 7,) that "A person who is absent from the Commonwealth for ten consecutive years shall lose his settlement," does not apply to the derivative settlement of a wife, which she acquired by marrying a man then having a settlement in this Com-

monwealth which he afterwards lost by leaving the Commonwealth and remaining continuously absent for ten years thereafter while his wife continued to live in this Commonwealth without acquiring any other settlement.

CONTRACT by the Attorney General in the name of the Treasurer and Receiver General under St. 1907, c. 474, § 10, as amended by St. 1912, c. 17, against the city of Boston to recover amounts paid at the rate of \$4 a week for the support at the Lakeville State Sanatorium of two persons alleged to have had throughout the period of such support legal settlements in Boston. Writ dated July 8, 1916.

The first count of the declaration related to the support at the sanatorium of one John H. Clark. The second count related to the support at the sanatorium of Jennie McLean from December 7, 1915, to May 31, 1916, amounting to \$101.41.

In the Superior Court the case was heard by *Dubuque, J.*, upon an agreed statement of facts. The second paragraph of the agreed statement of facts related only to John H. Clark and has become immaterial because the exceptions in regard to the first count were waived. The rest of the statement, consisting of the first and third paragraphs, was as follows:

"1. Jennie McLean and John H. Clark were inmates of the Lakeville State Sanatorium for the periods of time set forth in the plaintiff's declaration. They were each supported therein during said periods at the expense of the Commonwealth. No security has been given for their support, and no payment has been made to the Commonwealth on account thereof."

"3. Jennie McLean was born in Ireland on July 26, 1862. In 1892 she came to Boston and was married to Charles McLean, who had a settlement in Boston. In 1900 Charles McLean moved to Worcester and remained there until January, 1901, when he went to New York in the State of New York, and has resided there continuously to the present time. Jennie McLean continued to reside in Boston until admitted to said Sanatorium on December 7, 1915."

The judge found for the plaintiff in the sum of \$71.43 on the first count of the declaration and in the sum of \$101.14 on the second count, \$172.57 in all, with interest from the date of the writ. By order of the judge judgment was entered for the plaintiff in the sum of \$178.05; and the defendant appealed.

K. Adams, for the defendant.

W. H. Hitchcock, Assistant Attorney General, for the plaintiff.

CROSBY, J. This is an action brought under St. 1907, c. 474, § 10, to recover for the support of two patients in the Lakeville State Sanatorium for consumptives. The defendant having waived its exceptions as to the first count to recover for the support of John H. Clark and admitted its liability therefor, the question remains whether it is liable for the support of Jennie McLean, whose husband left the Commonwealth in 1901 and was continuously absent for ten years thereafter, it being the contention of the defendant that the settlement of the wife was defeated when that of the husband was lost.

It is conceded that, at the date of the marriage of these parties to each other, Charles McLean, the husband, had a legal settlement in Boston and by the marriage the wife derived a settlement from him. R. L. c. 80, § 1, cl. 1. When McLean left the Commonwealth in 1901, his wife continued to reside in Boston during the period of ten years thereafter, and there is no evidence that she has acquired a settlement elsewhere, nor does the defendant so contend. It is well established that a settlement once acquired is presumed to continue until another is gained elsewhere. *Williamsburg v. Adams*, 184 Mass. 263, 266. If the wife had not acquired a settlement through her husband upon their marriage, she would have gained a settlement in her own right during the ten years her husband was absent from the Commonwealth.

It is provided by R. L. c. 80, § 6, that "Any settlement which was not fully acquired subsequent to the first day of May in the year eighteen hundred and sixty is hereby defeated and lost, unless such settlement prevented a subsequent acquisition of settlement in the same place; but if a settlement acquired by marriage is so defeated, the former settlement of the wife, if not also so defeated, shall be revived. A person who is absent from the Commonwealth for ten consecutive years shall lose his settlement." Although the statute above quoted was repealed by St. 1911, c. 669, § 7, it was provided by § 5 that "All existing settlements shall continue in force until changed or defeated by the provisions of this act, and no person who has begun to acquire a settlement by the laws in force at and before the time when this act takes

effect . . . shall be prevented or delayed by the provisions hereof. . . .”

The decisive language of R. L. c. 80, § 6, upon which the defendant relies, is contained in the last sentence of the section. It is plain that literally construed the statute refers only to the person “who is absent from the Commonwealth.” It does not expressly provide that settlements derived from the person so absent shall also be lost, nor can the statute by implication be so construed.

A woman who has a legal settlement in the Commonwealth, at the time of her marriage to a man who is without a settlement here does not lose her settlement; and there is no reason to believe it to have been the intention of the Legislature that a married woman with a derivative settlement should lose it because her husband, by reason of absence from the Commonwealth, would lose his settlement. *Bradford v. Worcester*, 184 Mass. 557. *Williamsburg v. Adams*, 184 Mass. 263. *Stoughton v. Cambridge*, 165 Mass. 251. The statute should not be so construed as to deprive the wife of a settlement once acquired, in the absence of language clearly manifesting such an intention; and it is not to be extended by implication or judicial construction to include persons whom the Legislature has not seen fit to embrace within its scope.

The decisions upon the Maine St. of 1893, c. 269, do not support the defendant's contention. That statute expressly provides that the absent person “and those who derive their settlement from him” shall lose their settlement.

It follows that Mrs. McLean had a settlement in Boston while she was being supported in the State sanatorium and that the defendant is liable for the expense thereof. Accordingly, judgment is to be entered for the plaintiff for the full amount found due by the judge of the Superior Court.

So ordered.

LOUIS LAVOIE vs. PAUL DUBE & another.

Bristol. December 6, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Husband and Wife. Contract, Implied in law.

Where the facts are not such as to bring the case within the provision of St. 1910, c. 576, making a wife liable jointly with her husband to the amount of \$100 for a debt for necessities furnished with her knowledge or consent, if she has property to the amount of \$2,000, no action can be maintained against a husband and wife jointly upon a promise implied in law to pay for necessary board furnished to them, the promise which the law implies in such a case being a promise on the part of the husband alone to pay for such necessities.

In the case deciding the point stated above, the question, whether the plaintiff on the facts of that case could recover against the defendant husband alone, was not before the court.

CONTRACT against a husband and wife jointly on an account annexed for \$545 for board from September 1, 1913, to May 8, 1915, one hundred and nine weeks at \$5 a week. Writ in the Third District Court of Bristol dated May 19, 1915.

On appeal to the Superior Court the case was referred to an auditor, whose findings of fact were to be final. The auditor found for the plaintiff for the full amount claimed with interest from the date of the writ. Later the case was heard by *Brown, J.*, upon the auditor's report. The essential facts contained in that report are stated in the opinion. The defendants moved to have judgment entered for the defendants upon the auditor's report. The judge granted the motion and at the plaintiff's request reported the case for determination by this court. If his ruling was wrong, judgment was to be entered for the plaintiff in the sum of \$545 with interest from the date of the writ to August 15, 1916, amounting to \$40.60. Otherwise, judgment was to be entered for the defendants as ordered by the judge.

The case was submitted on briefs.

J. P. Doran, for the plaintiff.

F. A. Pease, for the defendants.

BRALEY, J. It appears from the auditor's report, whose findings of fact the parties agreed should be final, that the contract, whereby the defendants, who are husband and wife, in consideration that the plaintiff would care for and support them "during their lives, pay their doctor's bills and funeral expenses," agreed to pay a certain sum in money and to convey to him their farm which they owned as tenants in common, was a joint contract never reduced to writing. If the conveyance had been made, the defendants could have enforced the parol agreement to support them. *Lyman v. Lyman*, 133 Mass. 414. But the agreement to convey was within R. L. c. 74, § 1, cl. 4. While the money has been paid and the husband has executed a deed which never was delivered, the wife refused to join in the conveyance and absolutely repudiated the agreement. It is however unnecessary to decide whether on the findings in the report enough is shown to have been done by the plaintiff in reliance on the agreement to make it a fraud on the part of the defendants to deny its validity. *Barnes v. Boston & Maine Railroad*, 130 Mass. 388, 390. *Sarkisian v. Teele*, 201 Mass. 596, 608.

The absolute refusal to perform did not terminate the contract. The plaintiff was not in default. But, even if excused at his election from further performance, he could not by force of the statute sue at law for damages. It then was for him to decide whether he would resort to equity for specific performance, which if denied he still could have relief in damages, or to an action on any one of the appropriate common counts to recover for what he had done for the defendants' benefit and support. *Peabody v. Fellows*, 181 Mass. 26. *Earnshaw v. Whittemore*, 194 Mass. 187, 192. *DeMontague v. Bacharach*, 187 Mass. 128, 134. *American Stay Co. v. Delaney*, 211 Mass. 229.

The present action being on an account annexed for board furnished to the defendants jointly at the farm where they continued to live during the period elapsing between the date of the agreement to convey and the time of repudiation, the plaintiff, if it were not for the fact that the defendants are husband and wife would be entitled to recover the amount less any payments received. *DeMontague v. Bacharach, ubi supra*.

The claim, however, is for necessities, and, while the wife could bind herself jointly with her husband to convey the farm

or jointly or severally to pay their board as if she were sole, no express contract on which the account annexed could rest is shown. R. L. c. 153, §§ 2, 7. *Atkins v. Atkins*, 195 Mass. 124. The sole liability of the husband under such circumstances never having been abrogated by statute, there is no contract binding her by implication of law. *Shaw v. Thompson*, 16 Pick. 198. *Cunningham v. Reardon*, 98 Mass. 538. *Dolan v. Brooks*, 168 Mass. 350, 352. *Prescott v. Webster*, 175 Mass. 216.

The plaintiff also on the record is not within the St. of 1910, c. 576, amending R. L. c. 153, § 7, making a wife liable jointly with her husband "for debts due, to the amount of one hundred dollars . . . , for necessities furnished with her knowledge or consent to herself or her family, if she has property to the amount of two thousand dollars or more."

Nor is the question whether he can recover against the defendant husband, and if so to what amount, before us.

By the terms of the report the judgment for the defendants must be affirmed.

So ordered.

ESTHER KETTLEMAN vs. HYMAN I. ATKINS.

Suffolk. December 6, 1917. — January 2, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of general building contractor, Independent contractor. *Agency*, Existence of relation. *Witness*, Examination, Inconsistent statements.

If the general contractor for the construction of a building, who is himself a mason and has made a contract with a subcontractor for all the carpenter work of the building, goes to the building in process of construction after the mason work is completed for the purpose of seeing that the subcontractors perform their work in accordance with their contracts, this does not make him liable for an injury caused by the negligence of an employee of the subcontractor for the carpenter work.

In an action for personal injuries against the general contractor for the construction of a building, in which the point stated above was decided, the plaintiff called the defendant a witness, and the defendant on his direct examination made a statement that all the persons who worked on the building did so under his direction, but it was plain from his other testimony that when he said this he was referring to the subcontractors and not to the men in their employ, and it was held that this was no evidence that he was responsible for an injury

caused by the negligence of an employee of the subcontractor for the carpenter work.

In the case stated above it was *pointed out* that the conclusion reached in regard to the defendant's testimony was not at variance with the well established rule that if a witness in testifying makes inconsistent statements the jury may believe some of the statements and disregard others, because the defendant's statements understood in their obvious meaning were not inconsistent.

TORT for personal injuries sustained by the plaintiff at about four o'clock in the afternoon of December 30, 1914, when she had come out of the store of one Shapiro and was on the sidewalk at the corner of Lowell Street and Causeway Street in Boston, from being struck on the head and shoulder by a new piece of wood alleged to have fallen from a building in process of construction by reason of the negligence of a servant of the defendant at work on the building, which was being erected by the defendant. Writ dated May 14, 1915.

In the Superior Court the case was tried before *Sanderson, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for him. The judge refused to do this and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$300. The defendant alleged exceptions.

The case was submitted on briefs.

A. T. Johnson & J. P. Keefe, for the defendant.

H. E. Burroughs, for the plaintiff.

CROSBY, J. This is an action to recover for personal injuries received by the plaintiff while a traveller upon a highway in Boston known as Causeway Street, by reason of a piece of moulding, which was thrown or fell from a building in process of construction, striking her and causing the injuries complained of. The only question is whether there was any evidence to warrant the jury in finding that the plaintiff's injuries were caused by the negligence of the defendant.

The defendant, who was called as a witness by the plaintiff, testified upon direct examination, in part, that his business was that of a building contractor; that he had a contract with one Shapiro to erect the building in question; that he was at the building on December 30, 1914, the day of the accident; that he "sublet the carpenter, painting and plastering." He further testified, "I had a contract to do all the work. I hired the car-

penter and painter and looked after their work and was daily on the job to see what the painter or the carpenter or anybody else did about their work." He then was asked by the plaintiff's counsel the following questions and replied as follows:

"Q. And they worked under your direction? A. Yes, under the contract. — Q. While you sublet it to different people, they all worked under your direction? A. Yes. — Q. They had to do what you said? A. Yes. — Q. And whoever did that work were all under your direction? A. Yes."

Upon cross-examination he testified "that he sublet the carpenter work and the plastering work and had a contract with the carpenter to do the carpenter work. And, when he said that the carpenter did the work under his direction, he meant he did it under the terms of his contract with him and that he was there to see that the carpenter lived up to the terms of the contract with him and to see the quality of the work. He did no carpenter work himself. His own work was mason work and the mason work had all been finished at that time. So far as he was concerned, he was doing no work on his own account on that December 30. The work that was being done was being done under contract with various subcontractors holding contract under him."

It is the contention of the plaintiff that the answers above quoted, given by the defendant in reply to direct questions put to him by the plaintiff's counsel, are evidence in the nature of an admission that the defendant was in charge of the carpenter work upon the building at the time the plaintiff was injured. We cannot agree with that contention as it is plain that the answers upon which the plaintiff relies were given in connection with the defendant's previous testimony that he had sublet the carpenter work and certain other work upon the building.

The only fair inference from the testimony of the defendant to the effect, that all the men who worked on the building so worked under his direction, is that the subcontractors so worked as he had previously testified. It would be manifestly unfair, in considering this testimony, to deal with the defendant's answers disregarding what he said with reference to having sublet the carpenter work. The only reasonable inference leads to the conclusion that, when he said that all the men who worked on the building so worked under his direction, he referred to the sub-

contractors and not to the men in their employ. So construed, there is no evidence to warrant a finding that the piece of moulding which struck the plaintiff was thrown or fell from the building by reason of the negligence of any workman for whom the defendant was legally responsible. *Conley v. United Drug Co.* 218 Mass. 238, 242. *Saxe v. Walworth Manuf. Co.* 191 Mass. 338. *Hooe v. Boston & Northern Street Railway*, 187 Mass. 67.

The defendant is not liable for the negligence of employees of independent contractors. He could rightfully go upon the premises for the purpose of inspecting the work of such subcontractors and to direct them to perform their contracts in accordance with the terms thereof. *Healey v. American Tool & Machine Co.* 220 Mass. 236. *Hooe v. Boston & Northern Street Railway*, *supra*. *Delory v. Blodgett*, 185 Mass. 126.

The decision herein reached is not at variance with the well established rule that, if a witness in testifying makes inconsistent statements, the jury may believe some of the statements and disregard others, or may reject them altogether. *Commonwealth v. Clune*, 162 Mass. 206, 215. *Root v. Boston Elevated Railway*, 183 Mass. 418.

Let the entry be

Exceptions sustained.

BERTHA B. HATHAWAY vs. CHANDLER AND COMPANY,
INCORPORATED.

Suffolk. December 7, 1917. — January 3, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In maintenance of store. *Evidence*, Competency.

In an action against the proprietor of a store by a customer for personal injuries sustained when the plaintiff caught her foot in a strip of matting about forty-five feet long, four feet wide and a quarter of an inch thick, it appeared that the store was well lighted and that the matting was of a kind in common use made of cocoanut fibre. The plaintiff testified that after she fell she noticed that for the space of about twelve inches the matting was raised at the centre, but there was no evidence that it did not lie smoothly on the floor up to the time that the plaintiff caught her foot and fell and there was no evidence that the matting was worn, defective or curled up. *Held*, that there was no evidence of negligence on the part of the defendant, the condition of the matting before the accident being wholly a matter of conjecture.

In the case above described the plaintiff offered to show that at a time after the accident another person fell over the same matting when it was in the same position that it was at the time of the accident and excepted to the exclusion of this evidence but afterwards waived her exception, and it was *said* that the evidence offered was clearly inadmissible.

TORT against a corporation carrying on a retail dry goods store at 151 Tremont Street in Boston for personal injuries sustained by the plaintiff on September 19, 1914, when she was present in the defendant's store by invitation as a customer and fell over a matting alleged to have been negligently and improperly placed and suffered to remain on the floor. Writ dated February 11, 1915.

The answer contained a general denial and an allegation that the plaintiff was not in the exercise of due care and that her negligence contributed to her injury.

In the Superior Court the case was tried before *Dana, J.* The plaintiff's evidence is described in the opinion, where also is stated the evidence offered by the plaintiff and excluded by the judge. At the close of the plaintiff's evidence the defendant produced and offered in evidence a strip of matting, which, it contended and the plaintiff admitted, was like that which lay on the defendant's floor and which the plaintiff testified caused the accident, and then rested its case without further evidence. At the request of the defendant the judge instructed the jury that the plaintiff as a matter of law was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. F. Perkins, (H. C. Haskell with him,) for the plaintiff.

C. S. Knowles, for the defendant.

CROSBY, J. The plaintiff, as a customer of the defendant, was rightfully in its store by its invitation, and no contention is made that she was not in the exercise of due care when injured. The only question is whether there was any evidence which would warrant a finding that the defendant was negligent.

The plaintiff testified that as she was walking across the store with a friend her foot caught in a strip of matting upon the floor and she fell receiving the injuries complained of. She further testified that after she fell she saw the matting "looped up . . . that the center of the loop was from one and one half to two inches from the floor, and that about twelve inches in length of the edge of the rug was raised from the floor." The strip of matting was about forty-five feet long, four feet wide, and a quarter of an

inch thick, was green in color, and made of cocoanut fibre; there was evidence that it was of a kind in common and general use, and there was no evidence to the contrary.

The judge of the Superior Court rightly ruled that the plaintiff was not entitled to recover. Upon the evidence most favorable to her it seems plain that there was no negligence of the defendant. The case of *Toland v. Paine Furniture Co.* 179 Mass. 501, cited and relied on by the plaintiff, is clearly distinguishable from the case at bar. In that case the plaintiff caught her foot and fell over a rubber mat in a dimly lighted room. There was evidence that the mat was of cheap material, was much worn and curled up at the edge where she tripped, and was nailed down on each side. In the case at bar the evidence showed that the store was well lighted, and it did not appear that the matting was worn, defective or curled up; while the plaintiff testified that after she fell she noticed that for a space of about twelve inches the matting was raised at the centre for from one and a half to two inches from the floor, still there is no evidence whatever to show that it did not lie smoothly upon the floor up to the time the plaintiff caught her foot and fell.

The plaintiff's fall of itself is not evidence of negligence. As there is nothing to show that the edge of the matting was raised or was otherwise in a defective condition before the accident, there is no evidence of negligence on the part of the defendant. The condition of the matting before the accident does not appear; whether it was raised or lay smoothly on the floor is wholly a matter of conjecture. *Kelley v. W. D. Quimby & Co. Inc.* 227 Mass. 93. The cases of *Hendricksen v. Meadows*, 154 Mass. 599, *Morris v. Whipple*, 183 Mass. 27, *Ginns v. C. T. Sherer Co.* 219 Mass. 18, and *Nye v. Louis K. Liggett Co.* 224 Mass. 401, are all distinguishable from the case at bar. See *McGowan v. Monahan*, 199 Mass. 296.

The plaintiff offered to show that at a time after the accident another person fell over the same matting while it was in the same position as that testified to by the plaintiff. This evidence was excluded and the plaintiff excepted. The exception has not been argued and may be treated as waived; the evidence was clearly inadmissible.

Exceptions overruled.

ARCADE MALLEABLE IRON COMPANY vs. HARRY E. JENKS.

Worcester. October 1, 1917. — January 4, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Frauds, Statute of. Contract, In writing. Evidence, Extrinsic affecting writings.

In an action on an alleged guaranty by the defendant, one H E J, of the payment for certain goods furnished by the plaintiff to a corporation, called the G C Co., of which the defendant was the treasurer, the statute of frauds was pleaded, and the plaintiff to satisfy the statute relied on the following letter addressed to the plaintiff: "I will personally see to it that your bill is met on the 15th of each month. . . . Yours very truly, G C Co., By H E J." There was evidence, which had been admitted without objection, that the defendant had promised orally to guarantee the account and that he had failed to answer a letter from the plaintiff, written on receipt of the letter quoted above, stating, "We also note that you will personally guarantee the account." *Held*, that, even considering as extrinsic circumstances the oral promise and the unanswered letter, neither of which was admissible in evidence, the alleged memorandum as matter of law was not signed by the defendant and could not be found by a jury to have been signed by him.

In the same case the plaintiff relied upon a letter signed by the defendant in a subsequent correspondence between the parties as completing a memorandum to satisfy the statute when coupled with the letter quoted above, but it was *held* that, although such a coupling might have been resorted to if the defendant in the subsequent letter had acknowledged the guaranty contained in the first letter as having been made by him, this was not the case, and the subsequent letter, which was not a memorandum in itself, did not help the matter.

Although where the words of a contract in writing are ambiguous the extrinsic circumstances under which it was written may be shown by oral evidence to enable the court to view the words in the same light that the parties did, yet where the extrinsic facts are not in dispute, or after their existence has been shown, the construction of the ambiguous instrument in the light of these circumstances is for the court.

CONTRACT by a manufacturing corporation on an alleged guaranty by the defendant of the payment of the price for several lots of castings furnished by the plaintiff to the Grip Coupling Company, a corporation. Writ dated February 24, 1914.

The declaration contained three counts, each alleged to be for the same cause of action. The only count relied upon by the plaintiff at the trial was the third, which was as follows:

"Count Three. And the plaintiff further says that relying upon the guaranty of the defendant hereinafter set forth, it sold

and delivered to the Grip Coupling Co., a corporation having its usual place of business in said Ware, a lot of malleable iron castings, the kinds thereof and prices for the same, the total value thereof, and the dates of shipments to said Grip Coupling Co., being shown in the itemized account hereto annexed marked Exhibit 'A,' the said goods having been ordered by the said defendant as the treasurer of the said Grip Coupling Co., and the plaintiff further says that at the time the said goods were ordered as aforesaid and prior to the manufacture or delivery of any part thereof and as an inducement to, and the consideration for, the said sale and delivery, the said defendant guaranteed in writing the payment by the said Grip Coupling Co., of the goods so ordered by him for said company and made himself personally responsible therefor. A copy of the said writing with a copy of the reply thereto by the plaintiff being hereto annexed marked respectively Exhibit 'B' and Exhibit 'C.' And the plaintiff further says that demand for payment of the amount due for the said castings was duly made upon said defendant.

"Wherefore the plaintiff says the defendant owes it the said sum of six hundred and forty-four and 65/100 (\$644.65) dollars, the value of the said malleable iron castings of which the defendant guaranteed payment."

Exhibit A contained the account, which was undisputed.

Exhibit B was as follows:

"June 25th, 1912.

"Arcade Malleable Iron Co.,

Worcester, Mass.

Attention H. P. Buckingham.

"Gentlemen:

In regard to my agreement to write you made when you were here in reference to your bills. I will personally see to it that your bill is met on the 15th of each month.

Please find enclosed statement as per your request.

"Yours very truly,
Grip Coupling Co.
By H. E. Jenks."

"H. E. J./P.

Exhibit C was as follows:

"June 26, 1912.

"Grip Coupling Co.,
Ware, Mass.

Attention Mr. H. E. Jenks, Treas.

"Gentlemen:

We are in receipt of your letter of June 25th, with the enclosed statement of assets and liabilities as of May 1st, 1912. We also note that you will personally guarantee the account and see that our bill is met on the 15th day of each month and we thank you for this attention. We assure you that we will use every effort to give you good castings and will gladly do anything we can at any time to accommodate you.

Again thanking you, we are

"Yours truly,
Arcade Malleable Iron Co.
H. Paul Buckingham,
President."

"HPB/HIK

The answer among other matters set up as a defence the statute of frauds as follows: "The defendant says that the action declared on in the plaintiff's declaration and in each count thereof is on account of a special promise alleged to have been made by the defendant to the plaintiff to answer for the debt of another; that such promise upon which said action is brought, or some memoranda or note thereof, is not in writing and signed by the defendant or by any person thereunto by him lawfully authorized, as required by the provisions of R. L. c. 74, § 1."

In the Superior Court the case was tried before *King, J.* The items furnished and their value namely, \$559.59, were not in dispute and it was agreed at the trial that, if the defendant was liable at all, he was liable for the sum named. The evidence, as admitted by the judge without objection, is described in the opinion.

The additional correspondence relied on by the plaintiff, which is referred to in the opinion, was as follows:

"November 20, 1912.

"Mr. H. E. Jenks,
Ware, Mass.

"Dear Sir:

We have failed to receive the remittance from you this month

for your October account which amounts to \$352.97. Our understanding was that this account should be paid promptly on the 15th of each month or in case it was not that we were to hold up shipments on castings and hold up the moulding of your orders until same was paid. This we do not like to do because we know it causes you a lot of inconvenience. Will you kindly give this matter your attention and forward us a check for the above amount.

"Yours truly,
Arcade Malleable Iron Co.
Alonzo G. Davis,
Treasurer."

"AGD/HIK
"H. E. Jenks,
Upholsterer, Undertaker
and Funeral Director.
50 West Main Street.

Ware, Mass. November 29, 1912.

"Mr. H. Paul Buckingham,
Worcester, Mass.

"Dear Sir:

I have here a letter from Mr. Davis about payment of the Grip Coupling Co. bill. I hope you can arrange to send castings right along as usual and I will send you a check on the 15th of next month for everything. Mr. Merriam is to resign next Tuesday as manager, president and director. Then the people here are going to put in money to properly finance the business. If Mr. Davis cares to call up Mr. Hyde, he can confirm my statement, your money is sure, but collections have been very slow this month. I could send you a 30-day note if that will do you any good but I know Mr. Davis' attitude in regard to notes. Hoping you can see your way clear to accommodate the company for the next 15 days, I am

"Very truly yours,
H. E. Jenks."

The judge submitted the case to the jury upon the third count. His instructions to the jury are described in the opinion. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

G. D. Storrs, for the defendant.

W. H. Whiting, for the plaintiff.

LORING, J. In the count on which the plaintiff corporation went to trial it alleged that "the said defendant guaranteed in writing the payment by the said Grip Coupling Co., of the goods so ordered by him for said company and made himself personally responsible therefor. A copy of the said writing with a copy of the reply thereto by the plaintiff being hereto annexed marked respectively Exhibit 'B' and Exhibit 'C.'" A facsimile copy of Exhibit "B" is set forth above. Exhibit "C" was an unanswered letter from the plaintiff to the defendant dated June 26, 1912. We will deal with that later on. At the trial evidence was introduced without objection on the defendant's part that at a meeting in June between two officers of the plaintiff corporation and the defendant (who was treasurer of the Grip Company) the defendant was told that unless he "would personally guarantee the account" of the Grip Company the plaintiff would not continue to sell to it and thereupon the defendant agreed to personally guarantee the account. The defendant took the stand and denied that he ever agreed to guarantee the account of the Grip Company. The Grip Company failed to pay for goods sold to it by the plaintiff in October and November, 1912, and this action was brought to recover from the defendant the sums so due. The statute of frauds was pleaded in defence.

The letter of June 25 was put in evidence subject to the defendant's exception and at the close of the evidence the defendant asked the judge to rule: "That the instrument relied upon by the plaintiff is not a contract or promise of the defendant; neither is he a party thereto." In his charge to the jury the judge explained the defence of the statute of frauds and left it to them to determine whether in signing the letter of June 25, 1912, by writing "Grip Coupling Co., By H. E. Jenks" the defendant intended to sign that letter in his own behalf or in behalf of the Company. In addition he gave this instruction: "I charge you, as requested by the plaintiff, these letters that were written subsequent to the conclusion of the promise, although not speaking of this alleged contract of guaranty in terms, may be coupled together if it appears they all had relation to it for the purpose of the written

memorandum made by the party to be charged." There were three letters in evidence in addition to the letter of June 25. They are set forth above. No exception was taken to the charge.

There was a good deal of confusion in the trial and the written arguments (on which the case has been submitted to us) are not free from it.

To begin with the case was not tried on the pleadings. The plaintiff counted on the letter of June 25 as a written contract or promise, not as a memorandum of an earlier oral contract or promise. Under the pleadings the evidence of the oral promise, made before June 25 was not admissible. But it was admitted without objection.

Whether the letter of June 25 was signed by Jenks personally or by the Grip Coupling Company, is a question of law. The plaintiff has contended that the words in the body of the letter "I will personally see to it that your bill is met on the 15th of each month" makes the signature "Grip Coupling Co., By H. E. Jenks" an ambiguous one and, since that is so, the question whether the signature is the signature of the Grip Company or of the defendant is a question of fact for the jury. In his charge to the jury the presiding judge adopted that view. But that is not so. The plaintiff has relied in this connection upon the fact that the jury are rightfully called upon in cases where there is an ambiguity in a written contract and resort is had to extraneous circumstances under which it was made to determine its true construction. In such a case the jury have to pass upon the existence of the extraneous facts if their existence is in dispute. But where the existence of the extraneous circumstances is ascertained the question of the construction of the ambiguous contract interpreted in the light of these circumstances is for the court. In *Brown v. Fales*, 139 Mass. 21, 26, 27 it was said: "Where the language of a contract is equivocal in itself, or is made so by proof of extrinsic circumstances, so that it is susceptible of more than one construction, oral evidence is competent to show the situation of the parties, and to enable the court to be surrounded by the same circumstances as the parties were, and to look at the contract in the same light as they did, and thus to aid the court in applying and construing the language of the contract." The question was disposed of by the court as a question of law in

that case and also in *Bent v. Hartshorn*, 1 Met. 24 and in *Sullivan v. Arcand*, 165 Mass. 364.

The question whether the signature to the letter of June 25 is the signature of the Grip Company or of the defendant is a question of law to be determined in the light of all the facts in the case. Without so deciding, we assume in favor of the plaintiff that it must be decided in the light of the fact that the defendant had orally promised to guarantee the account (for on the evidence admitted without objection on the defendant's part the jury might have so found) and the fact that in the plaintiff's unanswered letter of June 26 it is stated that: "We also note that you will personally guarantee the account." Neither was admissible in evidence. Under a declaration counting on a written promise a previous oral promise is not admissible and an unanswered letter is not an admission and so is not competent evidence. *Callahan v. Goldman*, 216 Mass. 234, and cases there collected.

Why the defendant broke his oral agreement and sent a guaranty signed by the company, why he wrote the letter or had it written in one way and signed it in another way, and why he did not answer the letter of June 26 in which the plaintiff wrote him that "we also note that you will personally guarantee the account" we do not know. But it is the fact that he did break his oral promise; that he did write the letter in one way and sign it in another way and that he did not answer the plaintiff's letter of June 26 in which the plaintiff wrote that he (the defendant) in his letter of June 25 wrote that he would "personally" guarantee the account.

The signature "Grip Coupling Co., By H. E. Jenks" as matter of law is the signature of the company and not the signature of H. E. Jenks. No signature other than that used by the defendant could have made that plainer. The nearest cases in this Commonwealth are *Rice v. Gove*, 22 Pick. 158, *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347.

The plaintiff has put great reliance upon *McCrea v. Bentley*, 154 N. Y. Supp. 174, a decision made by the Supreme Court of New York at an appellate term. The letter in that case was signed "Herbert Pearce Co., By L. H. Bentley, Sec. & Treas." But the letter in *McCrea v. Bentley* contained promises by the company as well as personal promises by Bentley. Where prom-

ises by the company were referred to in the body of the letter the word "we" was used. Where personal promises on the part of Bentley the secretary and treasurer were referred to in the body of the letter the words "the writer" and "he" and "I" were used. It was held that the letter was written and signed "in a dual capacity." That does not go as far as we are asked to go in the case at bar. There is nothing in the other cases relied on by the plaintiff which calls for notice.

We are of opinion that the ruling asked for and refused was right.

But the plaintiff has contended that the exception to the refusal to give the ruling ought not to be sustained on the ground that the jury might have found for the plaintiff under that part of the judge's charge in which he told them that the subsequent letters could be coupled together for the purpose of making out a written memorandum of the oral agreement testified to by the plaintiff's witnesses. The answer to this contention is that the subsequent letters signed by the defendant coupled together or coupled with those to which they were an answer do not amount to a written acknowledgment that he personally guaranteed the account. To satisfy the statute the memorandum must be "signed by the party to be charged." If in answer to the plaintiff's letter of June 26 the defendant had signed a letter acknowledging the correctness of the interpretation put by the plaintiff upon the defendant's letter of June 25 a memorandum which satisfied the statute would have been made out by the several letters coupled together. But there were no writings in evidence in the case at bar signed by the defendant which coupled together or which coupled with letters written or signed by the plaintiff to which they were answers amounted to a memorandum of the oral agreement put in evidence by the plaintiff. Without the letter of June 25 the statute was not satisfied. The defendant therefore had a right to have the judge tell the jury that as matter of law the written "instrument relied upon by the plaintiff is not a contract or promise of the defendant; neither is he a party thereto." It follows that this exception must be sustained.

It appears that the statute of frauds is an insuperable obstacle to the maintenance of the action. Under these circumstances we

are of opinion, acting under St. 1913, c. 716, that judgment should be entered for the defendant.

Exceptions sustained.

Judgment for the defendant.

VERNON H. HALL & another, trustees, vs. LEWIS G. FARMER
& others, trustees in bankruptcy.

Middlesex. October 19, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Trust, When future estate vests. Deed. Bankruptcy, Rights of trustee. Words, "Then."

A deed made by an unmarried man conveying property to a trustee to pay the income to the settlor during his life and upon his death to distribute the trust fund among his children if he should leave any, the issue of any deceased child to take the share of such child by right of representation, and "if he [the settlor] shall leave no issue to distribute said trust fund among those who would take his real and personal property if he had then died intestate," where the settlor died without issue leaving as those who would take his property if he had died intestate two brothers and a sister, of whom one brother had been adjudged a bankrupt two years before the settlor's death, gave the bankrupt brother no vested interest in the trust fund before the persons who were to take that fund were determined upon the death of the settlor, and therefore his trustee in bankruptcy has no claim upon the fund.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on March 3, 1917, by the trustees under a deed of trust dated January 2, 1905, made by Horace Hall, then of Medford, afterwards and at the time of his death on February 10, 1916, a resident of Meddybemps in the State of Maine, for instructions, naming as respondents R. Linzee Hall, who was adjudicated a bankrupt on June 8, 1914, and his trustees in bankruptcy.

The Probate Court made a decree instructing the plaintiffs that R. Linzee Hall was entitled to one third of the trust fund in his individual capacity. His trustees in bankruptcy appealed.

On appeal the case was heard by *Loring, J.*, who reserved it for determination by the full court. The material facts are stated in the opinion.

L. G. Farmer, C. Hunneman & D. Stoneman, for the trustees in bankruptcy, submitted a brief.

C. B. Gleason, for the defendant R. Linzee Hall.

Rugg, C. J. This is a bill for instructions by trustees under a deed of trust. Horace Hall, the settlor, by deed conveyed property to the trustees in 1905 upon three trusts (1) to pay the income to him, Horace Hall, the settlor, during his life, (2) to divide the corpus of the trust upon his death "among his children if he shall leave any," the issue of any deceased child to take by right of representation the share which their parent would have taken, and (3) "if he shall leave no issue to distribute said trust fund among those who would take his real and personal property if he had then died intestate." The settlor died on February 10, 1916, without issue, never having married, leaving as those who would take his property if he had died intestate two brothers and a sister. The controversy arises as to the payment of the one third share of the trust fund which without question would go to R. Linzee Hall, one of these brothers, but for the fact that he was adjudged a bankrupt in 1914. His trustees in bankruptcy contend that this one third should be paid to them on the ground that it was a remainder vesting in him on the delivery of the trust deed, while R. Linzee Hall claims that share in his own right on the ground that nothing vested in him until the decease of the settlor.

The words of the trust instrument now operative were used, not in a will, but in a deed. The persons who would inherit his real and personal property if the settlor died intestate could not by any means be ascertained until he died. He was not dead, but alive, when the deed took effect and the estates created by it were established. He had no heirs then. He could have no heirs until he died. The most he could have would be prospective heirs. But whether R. Linzee Hall ever would be his heir was contingent, first, upon R. Linzee Hall surviving the settlor, second, upon the settlor leaving no child or children and third, upon the settlor leaving no issue of any deceased child. These events must of necessity all remain uncertain until the death of the settlor. Manifestly the word "then" as used by the settlor in the phrase "if he had then died intestate," must refer to the time of the settlor's death. It can have no rational reference to any other point of time. It is not used here, as it often is, to state a consequence of an event, but to fix a time for the ascertainment of the persons to enjoy the benefactions. *Boston Safe Deposit &*

Trust Co. v. Blanchard, 196 Mass. 35, 39. The facts that the settlor was the sole beneficiary of the trust during his life, that he was unmarried, that he gave the fund to his children, if he should marry and leave such at his death, and that in the event of the decease of children he gave the fund to the issue of his deceased child or children, all tend to show that the persons entitled to receive the fund are to be determined on the footing that the settlor had retained title until his death and then had died intestate.

The case at bar comes directly within the rule stated by Chief Justice Morton in *Putnam v. Story*, 132 Mass. 205, 210, in these words: "In the case of a devise or bequest to a man for life and at his death to his heirs, it is true that, if he has no children at the death of the testator, his heirs presumptive would not take a vested interest, because there is the contingency that they may be supplanted or displaced as heirs presumptive by the birth of children to the life tenant, and therefore that they may never take at all, even if they survive the life tenant."

The review of cases in *Clarke v. Fay*, 205 Mass. 228, demonstrates that the right of R. Linzee Hall under this deed was contingent and in no sense vested until the decease of the settlor. *Wood v. Bullard*, 151 Mass. 324. *Bigelow v. Clap*, 166 Mass. 88. *Wason v. Ranney*, 167 Mass. 159. *Putnam v. Gleason*, 99 Mass. 454. *Lavery v. Egan*, 143 Mass. 389. *White v. Underwood*, 215 Mass. 299. *Dove v. Torr*, 128 Mass. 38, is not similar to the case at bar in its decisive factors. In that case "then" indicated the point of time at which the enjoyment of an ascertained estate in remainder should begin, the persons entitled to that enjoyment being already determined.

It follows that since no interest in the fund vested in R. Linzee Hall until the death of the settlor the decree of the Probate Court was right and is

Affirmed.

THOMAS F. JOYCE vs. CHARLES H. R. THOMPSON, administrator.

Essex. November 7, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Judgment. Equity Pleading and Practice, Demurrer. Equity Jurisdiction.
To set aside judgment at law.

A judgment rendered in an action at law where the court had jurisdiction of the parties and of the subject matter cannot be impeached collaterally by a party to it either at law or in equity, the only remedy for a person aggrieved by such a judgment being by review or by a proceeding to reverse it upon a writ of error.

A demurrer to a bill in equity seeking to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, where the bill contains an allegation that the notes on which the judgment was obtained were executed on Sunday, does not admit that the judgment is tainted with illegality and therefore void, because such a judgment is conclusive between the parties until it is reversed or set aside by appropriate proceedings at law.

It is no ground for maintaining a suit in equity to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, that the promissory notes on which the judgment was obtained were executed on Sunday and that the plaintiff had an absolute defence to the action.

BILL IN EQUITY, filed in the Superior Court on October 2, 1916, to set aside a judgment for \$680.87 rendered against the plaintiff on August 5, 1895, in an action on three promissory notes brought by the defendant as administrator of the estate of Anna R. Thompson, and to restrain the defendant from maintaining an action on such judgment on the grounds stated in the opinion.

The defendant demurred to the bill and assigned as causes of demurrer the following:

"1. The judgment rendered in favor of the present defendant against the present plaintiff on August 5, 1895, is a judgment of a domestic court of record of common law jurisdiction and is conclusive evidence of the facts therein decided until reversed on writ of error.

"2. The plaintiff has a plain, adequate and complete remedy at law by writ of error or by petition for a writ of review."

The case was argued on the demurrer before *Stevens, J.*, who made an order that the demurrer be sustained. Later by order

of the judge a final decree was entered ordering that the bill be dismissed with costs to the defendant. The plaintiff appealed.

The case was submitted on briefs.

M. A. Cregg & H. A. Cregg, for the plaintiff.

S. H. Hollis, for the defendant.

CROSBY, J. This is a bill in equity brought to restrain the defendant from maintaining an action on a judgment rendered in the Superior Court for the county of Essex more than twenty years ago. The bill alleges that no personal service of the writ in the original action ever was made upon this plaintiff, that he had no knowledge of the action and that judgment was obtained against him upon a default. The bill further alleges that the action was brought upon three promissory notes given by this plaintiff to the defendant's intestate; that all of the notes were executed on Sunday, that one of the notes "was outlawed" and that the plaintiff did not learn of the action until September 27, 1915.

It has long been settled in this Commonwealth that a domestic judgment rendered by a court of common law jurisdiction is valid as between the parties until reversed. Such a judgment cannot be impeached collaterally by the parties to it, the reason therefor being, not because of an apparent authority in the court to render the judgment, but because the remedy by review, or writ of error, is held to be more appropriate. *Hendrick v. Whittemore*, 105 Mass. 23. *Bishop v. Donnell*, 171 Mass. 563. The only remedy of a party who has been injured by a judgment erroneously rendered "is by review, or by proceeding to reverse the same upon a writ of error." *Fogel v. Dussault*, 141 Mass. 154, 157. *Chicago Title & Trust Co. v. Smith*, 185 Mass. 363, 365. That a party to a judgment cannot impeach it collaterally, is well established in equity as well as at law. *Boston & Worcester Railroad v. Sparhawk*, 1 Allen, 448. *Gorman's Case*, 124 Mass. 190.

It is the contention of the plaintiff that, as the bill alleges the notes to have been executed on Sunday and the demurrer admits the truth of this allegation, the judgment is tainted with illegality and therefore void. The answer to this contention is that the judgment stands until it is reversed or set aside by appropriate proceedings at law.

This court has held in certain cases that a judgment may be

set aside and reversed in equity for fraud. It has been held that, where the fraud was of such a character as to have induced the court to assume a jurisdiction which it could not have exercised had the truth been known, and by reason of which the adverse party was prevented from appearing and asserting her legal rights, a judgment so obtained will be set aside. *Sampson v. Sampson*, 223 Mass. 451. *Keyes v. Brackett*, 187 Mass. 306. *Brooks v. Twitchell* 182 Mass. 443. *Edson v. Edson*, 108 Mass. 590.

In *Zeitlin v. Zeitlin*, 202 Mass. 205, it was held that a decree for divorce after it has become absolute cannot be set aside if the court had jurisdiction to grant the decree, even though it was made because of perjured testimony knowingly procured by the libellant, and because of fraud practised upon the court. See also *Nesson v. Gilson*, 224 Mass. 212.

The cases above referred to, and others in which this court has held that a judgment or decree of the court may be reversed or set aside, have no application to the case at bar, in which it appears that the court had complete jurisdiction of the parties and of the subject matter of the original action. The fact, that the notes were executed on Sunday and that this plaintiff had an absolute defence to the action, is not evidence of fraud and can give to the plaintiff no ground in equity for setting aside the judgment.

The cases decided by this court, cited and relied upon by the plaintiff, are clearly distinguishable from the case at bar.

It follows that the final decree dismissing the bill must be affirmed, with the costs of the appeal.

So ordered.

ANNIE J. DONNELLY & others vs. FREDERICK L. ALDEN.

FREDERICK L. ALDEN & others vs. FRANCIS

J. DONNELLY & others.

ANNIE J. DONNELLY & others vs. FREDERICK

L. ALDEN & others.

Essex. November 7, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Executor and Administrator, Notice. Equity Jurisdiction. To set aside mortgage, To rescind sale induced by fraud, To establish trust, To recover money wrongly paid by executor.

In a suit in equity, by certain minors entitled to the remainders under a trust created by a will, to set aside a mortgage made by the former executors of the will, acting as trustees, to the defendants, who were a firm of wholesale shoe dealers, to secure the payment of the indebtedness of the executors to the defendants for shoes sold to the executors while they were carrying on the retail shoe business of the testator after his death in the name of his estate, it appeared that the executors were not authorized to carry on the business of the testator, but that the managing executor had represented to the defendants that they had such authority, and that, when the defendants later discovered the executors' want of authority and the deceit practiced upon the defendants by the managing executor, instead of rescinding the sale and demanding back their goods, they took from the executors as trustees a mortgage of the real estate of the testator as security for their account against the executors. The trial judge found that, as to the goods shipped by the defendants after the testator's death, they did not suspect and had no reason to suspect any breach of trust. *Held*, that the defendants, knowing of the death of the testator, ought to have inspected the probate records, which would have shown them that the executors had no authority to conduct the business and would have led to the further discovery that the persons interested in the remainder were minors, and that the finding of the trial judge as to the actual state of mind of the defendants was immaterial, and accordingly that the mortgage must be set aside.

With the suit described above was tried a suit by the members of the firm of wholesale shoe dealers, the defendants in the first case, against the administrators *de bonis non* of the estate of the testator to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*. There was no finding that the goods furnished by the firm which were in the store when the administrators *de bonis non* took possession could be identified, and the evidence indicated that, although these goods might have been identified and separated, this was not done and it appeared that afterwards all the goods in the store, including these and all the others, were sold for a single price. *Held*, that it was too late for the members of the firm to attempt to rescind their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds.

In a cross bill filed by the administrators *de bonis non*, who were the defendants in the suit described above, in which the remaindermen joined through their guardian *ad litem*, it was sought to compel the firm of wholesale shoe dealers to repay the amount of the money paid to them by the former executors without authority on the principle of *Hines v. Lovers & Sargent Co.* 226 Mass. 214. The trial judge was "not satisfied that the business was conducted by the executors at a loss." *Held*, that, if there was no loss, there was no debt to the estate to be paid, and that the cross bill must be dismissed.

BILL IN EQUITY, filed in the Superior Court on May 23, 1916, by the three minor children of Francis J. Donnelly, grandchildren of Peter Donnelly, late of Lynn, and the beneficiaries in remainder under his will, against Frederick L. Alden, as mortgagee for the benefit of the firm of Alden, Walker and Wilde, wholesale shoe dealers, seeking to cancel a mortgage alleged to have been given without authority by Anne Donnelly and Francis J. Donnelly, as trustees under the will of Peter Donnelly, to secure an indebtedness for shoes sold and delivered to them by the said firm, the indebtedness thus attempted to be secured being the personal indebtedness of Francis J. Donnelly or of him and Anne Donnelly and not the indebtedness of the trust estate; also a

BILL IN EQUITY, filed in the Superior Court on August 2, 1916, by the members of the firm of Alden, Walker and Wilde, against the administrators *de bonis non* with the will annexed of the estate of Peter Donnelly, seeking to impress a fund of \$11,000 in the hands of such administrators with a trust to the extent of \$4,259.91 for the benefit of the plaintiffs to satisfy their claim for the price of shoes sold and delivered to the estate of Peter Donnelly, induced by the false representations of Francis J. Donnelly that he or he and Anne Donnelly had authority to carry on the shoe business in behalf of that estate; also a

CROSS BILL IN EQUITY, filed on October 2, 1916, by the defendants in the suit brought by the members of the firm of Alden, Walker and Wilde, in which the administrators *de bonis non* with the will annexed of the estate of Peter Donnelly sought to recover the amounts of money paid without authority to the said firm by Francis J. Donnelly and Anne Donnelly out of the estate of Peter Donnelly.

The three cases were heard together by Fox, J. He made a memorandum of findings, including the findings which are stated and described in the opinion. The judge ordered that there should

be decrees for the plaintiffs in each of the first two suits and that the cross bill should be dismissed.

Later by order of the judge final decrees were entered, ordering that in the first suit the mortgage should be cancelled, that in the second suit the plaintiffs' claim was established in the sum of \$4,259.91 and that the fund of \$11,000 in the hands of the administrators *de bonis non* was impressed with a trust to that extent, and that the cross bill should be dismissed. An appeal was taken from each of the decrees.

H. D. Linscott, (*J. J. Doherty* with him,) for Annie J. Donnelly and others.

E. J. Flynn, (*W. J. Holbrook* with him,) for Frederick J. Alden and others.

Rugg, C. J. These are suits growing out of the estate of the late Peter Donnelly, hereafter called the testator. He died in July, 1914, a resident of Lynn. By his will he gave all his property to trustees, who also were executors, in effect upon the trust to pay the income to his widow, Anne, during her life, and thereafter to his son, Francis, during his life, the principal then to go to the children of Francis, all of whom are now minors. The testator's property consisted in part of two parcels of real estate and two retail shoe stores in Lynn. The stores had been prosperous. Francis, who had assisted the testator in the stores, continued to carry on the business without change with the assent of his mother after the testator's death. Although the same persons were named as executors and trustees, they are liable in the former capacity under the facts here disclosed. *Welch v. Boston*, 211 Mass. 178, 181. The defendants Alden, Walker and Wilde, hereafter called the firm, were shoe manufacturers who had sold shoes to the testator. Shortly after his death Francis told one of the firm that the estate had been left to his mother and himself, and that they owned the stores and were going to continue the business in the name of the estate of Peter Donnelly. Relying on these statements, the firm continued to ship goods to the Donnelly stores.

The firm had no right to rely upon the statements of Francis so far as concerns the liability of the estate. They knew that their former customer was dead. They were chargeable with knowledge of what the probate records of this Commonwealth

would disclose touching his estate so far as they seek to charge it with liability. The executors were not authorized either by the will nor by the Probate Court under St. 1910, c. 411, to carry on the business of the testator. These facts would have been ascertained if the probate record had been examined. The firm also would have discovered, either from that record or from the investigation which naturally would have followed a reading of the will, that the remaindermen chiefly interested in the estate were minors without a guardian. Hence the firm further would have discovered that the executors were not and could not have been authorized by all the parties in interest to carry on the business of the testator. The use by the executors of the assets of the estate for that purpose was a violation of their trust. As matter of law the estate of the testator would not be liable for debts incurred by the executors in conducting the business as a financial adventure. *Stearns v. Brookline*, 219 Mass. 238, 240. Actual knowledge of all the facts is not necessary in order to charge the firm with notice of them. The circumstances that confessedly were brought home to the knowledge of the firm were such as ought to have put them on inquiry and they are affected with knowledge of the facts which such an inquiry would have revealed. *Bancroft v. Consen*, 13 Allen, 50. *Connors v. Lowell*, 209 Mass. 111, 118, 119. *Broadway National Bank v. Adams*, 133 Mass. 170, 173. One who receives with notice money of a trust in breach of the trust, becomes himself a trustee and liable to account as such. *Trull v. Trull*, 13 Allen, 407. *Shaw v. Spencer*, 100 Mass. 382.

The finding of the judge that the firm, as to the goods shipped by them after the testator's death, did not suspect and had no reason to suspect any breach of trust, will not be overturned so far as it is a finding of fact. But the undisputed facts make it plain as matter of law that their actual state of mind is of no consequence. The firm knew of the death of the testator. They ought to have inspected the probate records. But they never did. If they had examined the records, the firm would have known that the executors had no authority to conduct the business. Ignorance of the law is no excuse in this respect. The inaccurate or deceitful statement of Francis in this regard cannot affect the rights of the minor beneficiaries under the will. It confers no

rights upon the firm as against them or as against the trust property in which they have an interest.

The firm doubtless might have rescinded their sales to the executors on ascertaining the deceit practiced on them by Francis J. Donnelly and taken back their goods. *Rackemann v. Riverbank Improvement Co.* 167 Mass. 1, 4. But the firm did not elect to rescind the sale when the misrepresentations as to the way in which the business of the testator was left by him were discovered. On the contrary, after full knowledge of what the probate records revealed, they took a mortgage on real estate of the testator executed in the name of the trustees, as security for their claim. With full knowledge they affirmed the transactions and for business reasons chose to try to secure what they could in that way. It is too late now to undertake to retrace those steps.

There is no finding that the goods furnished by the firm, which were in the store at the time the administrators *de bonis non* of the estate of the testator took possession, could be identified. An examination of the evidence convinces us that, while they could have been identified and separated, this was not done, and therefore it is impossible to determine now how much there was or what was its value. If it be assumed that at that time the firm might have rescinded the sale and replevied from the stock the shoes furnished by them, that remedy or its equivalent cannot now be invoked. One sale at a single price having been made of these and all other goods in the store, there is now no way of dividing the fund and awarding to the firm the part which the goods furnished by them contributed to the sum received by the administrators *de bonis non*. This is not a case of fraudulent or reckless intermingling of goods against the rights of the firm and the principle of *Peoples National Bank v. Mulholland*, 228 Mass. 152, 157, does not apply.

Since with full knowledge of the whole situation the firm affirmed all its transactions with the executors, they cannot now appeal to the principle of unjust enrichment or to other equitable doctrines designed to afford relief to innocent sellers who have been defrauded by the words or conduct of crafty buyers.

There is nothing in the facts or in the principles of law applied in *Allen v. Puritan Trust Co.* 211 Mass. 409, and in *Allen v. Fourth National Bank*, 224 Mass. 239, which is inconsistent

with the result here reached or which need to be reviewed in detail.

It follows that the firm cannot for the purpose of securing their claim impress a trust upon the fund in the hands of the administrators *de bonis non* derived from the sale of the stores. It follows, also, that the mortgage given upon real estate of the testator in partial payment for goods furnished by the firm after his death was void and must be cancelled. These two aspects of the controversies are governed in their legal aspects by the principles stated in *Hines v. Levers & Sargent Co.* 226 Mass. 214.

It remains to consider the cross bill by the administrators *de bonis non*, in which the remaindermen through their guardian join, to compel the firm to repay moneys paid to them by the executors on account during the period when they carried on the business. The finding of the judge upon this point is that he is "not satisfied that the business was conducted [by the executors] at a loss. There is evidence that the stores did a large business . . . the value of the estate at the time of Peter's death has been grossly exaggerated. If there has been any wasting of the estate, I am satisfied that it has not been brought about by the running of the stores for a period of twenty months." The evidence consisted chiefly of oral testimony. The familiar rule in such cases in equity is that, while it is the duty of this court on appeal to examine the evidence and decide the case according to their judgment, giving due weight to the finding of the trial judge, yet since the trial judge has had the advantage of seeing the witnesses and thus of weighing their testimony, his finding will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200. Guided by that rule, a careful examination of the evidence as reported does not lead us to the conclusion that this finding must be overturned. Treating the firm as trustee respecting the payments made to them by the executors on account of goods delivered, this finding affords no reason for compelling them to return these payments. If the business has not been run at a loss, then the estate has suffered no harm by reason of these payments to the firm. These payments were made for an equivalent in goods furnished. A trustee is not required to do more than make good the losses falling upon the trust by reason of his wrong. If there has been no loss, there is no debt to be paid.

The finding of fact upon this point in the case at bar is the reverse of the finding of fact made in *Hines v. Levers & Sargent Co.* 226 Mass. 214. Hence an opposite result must be reached as matter of law.

The conclusion is that, in the suit to set aside the mortgage given by the trustees to the firm in part payment of their account, the decree granting relief is affirmed. In the suit by the firm against the administrators *de bonis non*, to impress a trust upon funds in their hands, the bill is dismissed. In the cross bill by the administrators *de bonis non*, to recover payments made by the executors to the firm, a decree is to be entered dismissing the cross bill.

So ordered.

ROCK GLEN SALT COMPANY vs. JACOB N. SEGAL.

Suffolk. November 8, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Construction. Sale, Acceptance. Bill of Lading.

Where a customer of a salt company ordered from the company a certain amount of salt at an agreed price "F. O. B. cars, Boston" and the salt company shipped by rail to Boston, under a bill of lading in which the company itself was named as the consignee, a larger amount of salt than that required by the customer's order and indorsed on the bill of lading an order to "Deliver to order of" the customer, this was *held* to indicate an intent on the part of the seller to reserve to itself the right of disposing of the salt until the railroad company in Boston in behalf of the seller and in the exercise of the authority conferred by the indorsement on the bill of lading should appropriate and deliver to the customer from the mass the quantity and kind of salt ordered by him.

Where, in attempted pursuance of a contract of a salt company to sell to a customer four hundred bags of salt at an agreed price, a railroad corporation as the agent of the salt company tenders to the customer the contents of a car containing not only the four hundred bags of salt called for by the contract but also fifteen barrels of salt that had been bought by another person and where the customer in order to obtain the salt would have been obliged to advance freight charges in excess of the amount that he had agreed to advance, the customer has the right under St. 1908, c. 237, § 44, cls. 2, 3, either to accept the part of the salt described in his contract "and reject the rest, or he may reject the whole," the customer not being bound to incur the trouble or risk of procuring a severance of the fifteen barrels from the four hundred bags of salt. Following *Rommel v. Wingate*, 103 Mass. 327.

CONTRACT for \$322.56 as the price of certain salt, as described in a paragraph of the report which is quoted in the opinion, alleged to have been sold to the defendant. Writ in the Municipal Court of the City of Boston dated April 28, 1913.

The evidence at the trial in the Municipal Court is described in the opinion. The defendant asked the judge to make certain rulings, among which were the following:

"8. Where the seller delivers to the buyer goods which he contracted to purchase mixed with goods of a different description not included in the contract the buyer may reject the whole.

"9. The defendant was not bound to accept a greater quantity of goods than he ordered.

"10. The plaintiff by appropriating a greater quantity of goods than the defendant contracted to buy did not perform his contract and therefore cannot maintain this action."

The judge made the following findings and rulings: "I find that the invoice dated February 14 was received by the defendant on or before February 18; that the car containing four hundred bags and fifteen barrels of salt arrived in Boston February 18; that the Boston and Maine Railroad had then received the bill of lading indorsed by the plaintiff to the defendant's order; and that said company on or about February 19 sent notice to the defendant and that the salt was damaged February 26. I rule that the title had passed to the defendant before February 26, and that the salt was then at his risk. I refuse to give the rulings requested by the defendant."

The judge found for the plaintiff in the sum of \$344.19, and at the request of the defendant reported the case to the Appellate Division. The Appellate Division made an order that judgment be entered for the defendant, and the plaintiff appealed.

The case was submitted on briefs.

J. A. Curtin, W. F. Poole & A. S. Allen, for the plaintiff.

S. T. Lakson, for the defendant.

PIERCE, J. "This is an action of contract to recover the purchase price of 300 burlaps 70/2s Table Salt at \$1.05, 50 burlaps 50/3s Table Salt at \$1.02 and 50 burlaps cotton 200s V.C.F. Salt at \$0.74, amounting in all to \$403, less freight, \$80.44, net amount \$322.56."

A "Memorandum of agreement" for the purchase and sale of "a supply of salt numbering five to ten cars" fixed the prices to be paid for different kinds of salt F. O. B. cars, Boston. The shipment in question was the last to be made under this contract and no question as to previous shipments is involved.

The defendant had previously ordered and received at different times during the period covered by the contract and the time following its extension, nine carloads of salt, and each time paid freight on the goods that he had ordered and deducted the freight charges from his invoice when he paid such invoice. It was understood between the parties that the goods were to be invoiced "less freight" and that the defendant should pay the freight charges on his goods when they arrived and deduct the amount from the bill when remitting.

On February 8, 1913, the plaintiff purchased of the Watkins Salt Company, Watkins, New York, the salt in bags ordered by the defendant. Two days later the plaintiff purchased fifteen barrels of salt ordered by another of its customers. The salt in bags and barrels was placed in a car and shipped at the plaintiff's request from Watkins, New York, to the Rock Glen Salt Company, Boston. The plaintiff took from the carrier a non-negotiable bill of lading. The salt was not consigned to the defendant, but on the contrary was consigned to the plaintiff itself, and was described in the bill of lading as "15 Bbls. 400 Sax Weight 64600 lbs." "Destination, Boston State of Mass." "Route B. & M. Car Initial Erie Car No. 111529." This bill of lading was indorsed "Deliver to order of Segal Bros. Rock Glen Salt Co. F. W. Relyea, Treas." It was then sent to and received by the Boston and Maine Railroad at Boston, but it was never delivered to or accepted by the defendant.

The car containing the bags and barrels of salt arrived in Boston at the Boston and Maine freight house on February 18, 1913. On February 19, 1913, the Boston and Maine Railroad notified the defendant in writing of the arrival of freight consigned to the Rock Glen Salt Company and stated that it was ready for delivery. The notice gave the "Car Initial and Nos." as "E 111529" and the "Original Point of Shipment" as "Watkins

N. Y. Via ER." It described the "Articles and Marks — Weight — Rate — Freight — Advances" as

"15 Bbl. 400 sx. }	Salt	64600	90.44	Total, 90.44."
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Neither the bill of lading nor the notice stated the different kinds of salt that made up the four hundred bags nor the quantity of each kind. Nor did the defendant know that the fifteen barrels of salt had been put into the car with the four hundred bags to fill an order of another customer of the plaintiff.

When the defendant received the notice he had already received an invoice for salt as ordered, which showed a shipment over the Boston and Maine Railroad in "Car No. 111529 Erie," the amount of said invoice being \$403 "less freight" \$80.44, or \$322.56. He compared the notice with the memorandum of his order, found that the salt stated in the notice did not correspond to the order given by him to the plaintiff, noticed that the freight charges were excessive for the quantity of salt ordered by him, and that they covered the whole quantity of salt contained in the car. He thereupon returned the notice to the "railroad's messenger." Without contradiction, so far as the record discloses, he testified "that there was no way in which the freight charges could have been apportioned or separated and if [he] the defendant had accepted any part of this car of salt he would have been obliged to pay the full amount of the freight charges on said car." He also testified that "he had a charge account with this railroad for freight due the railroad on shipments, and that actual payment by him to the railroad at the time of receiving possession of shipments was not necessary to receive such possession."

On February 26, 1913, the car of salt was damaged by fire at the Boston and Maine freight house and the defendant refused to receive the salt. The presiding judge ruled "that the title had passed to the defendant before February 26, and that the salt was then at his risk," and found for the plaintiff. Upon report, the Appellate Division of the Municipal Court of the City of Boston, ordered "Judgment for defendant," and the case is before this court on appeal from that decision.

We think the forwarding of the salt to Boston at the seller's expense, the taking of a bill of lading running to itself as consignee, and the provision in the contract "sells . . . at the fol-

lowing prices F. O. B. cars, Boston," indicate an intent of the seller to reserve to itself the *jus disponendi* of the salt until the railroad company in Boston on behalf of the plaintiff, and in the exercise of the authority conferred by the indorsement upon the bill of lading, should appropriate and deliver to the defendant from the mass the quantities and kinds ordered by the defendant. *First National Bank of Cairo v. Crocker*, 111 Mass. 163, 167. *Sawyer Medicine Co. v. Johnson*, 178 Mass. 374. St. 1908, c. 237, § 19, Rule 5. The question is, Was the notice of the Boston and Maine Railroad an appropriation and proper tender on behalf of the plaintiff of the salt to the defendant in performance of the contract?

In this regard it is to be noticed that the railroad company was not instructed by the bill of lading or otherwise of the kind or quantity of salt required to fill the defendant's order. Nor, so far as appears, was there anything about the bags or barrels to indicate the quality of their contents. What the railroad did was to tender the contents of a car, — a quantity of goods larger than the defendant agreed to purchase and on which the defendant would have been obliged to advance freight charges in excess of the amount he agreed to advance.

St. 1908, c. 237, § 44, contains among others, the following provisions:

"(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole."

"(3) Where the seller delivers to the buyer the goods which he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

These sections express the effect of *Rommel v. Wingate*, 103 Mass. 327, *Levy v. Green*, 1 El. & El. 969, *Rylands v. Kreitman*, 19 C. B. 351, *Perry v. Mount Hope Iron Co.* 16 R. I. 318.

In the case at bar the defendant, upon receiving the notice and invoice, could have assumed properly that the fifteen barrels of salt had been sent by the seller to be delivered by the railroad to him. The bill of lading in terms directed the railroad company

to do so. Upon this assumption, if he did not intend to pay for the whole car, he must have determined whether to take a part and reject a part, or reject the whole. If he desired to have the part only which he had ordered, it remained to determine whether he would become responsible for the entire freight charges and look to the purchaser of the fifteen barrels or to the seller for his repayment. If it were a fact that the defendant could have paid the proportionate charges, that fact does not appear in the report and cannot be assumed. We are of opinion that the severance of the four hundred bags from the fifteen barrels involved pecuniary "trouble" or "risk" to the defendant. *Levy v. Green, supra.*

It follows that the title never passed to the defendant.

Judgment for the defendant affirmed.

FRANK J. FAULKNER & another, executors,
vs. TAX COMMISSIONER.

Essex. November 8, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On income. Statute, Construction. Words, "Since deceased."

St. 1916, c. 269, imposing a tax upon the income received from certain forms of intangible property and from trades and professions, which provides in § 1, that "There shall be levied in the year nineteen hundred and seventeen, and in each year thereafter, a tax upon incomes as hereinafter set forth," and in § 8 provides, that "The income received by persons since deceased shall be taxed to their estates," does not apply to the income received before his death by a testator who died in the year 1916 nor to the income received by the executors of his will from his estate from the time of his death to the end of the year 1916.

Where a statute imposing taxation is not declared to be retroactive, it cannot be extended by implication to make it so.

PETITION, under St. 1916, c. 269, § 20, filed in the Superior Court on September 28, 1917, by the executors of the will of Joseph Faulkner, late of Hamilton, who died on November 29, 1916, appealing from the refusal of the Tax Commissioner to abate an income tax upon income received during the period from January 1, 1916, to November 29, 1916, by the petitioners' testator before his death and income received by the petitioners as such

executors during the period from November 30, 1916, to December 31, 1916.

The case was submitted upon an agreed statement of facts to *Hitchcock, J.*, who by agreement of the parties reported it without decision under the provisions of St. 1917, c. 345, for determination by this court.

St. 1916, c. 269, is entitled, "An Act to impose a tax upon the income received from certain forms of intangible property and from trades and professions."

Section 1 of that statute is as follows: "There shall be levied in the year nineteen hundred and seventeen, and in each year thereafter, a tax upon incomes as hereinafter set forth."

Section 8 of the same statute begins as follows: "The income received by persons since deceased shall be taxed to their estates."

G. Newhall, for the petitioners.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

BRALEY, J. The petitioners, who are the executors of the will of Joseph Faulkner, filed with the respondent a return of income for the period from January 1, 1916, to November 29, 1916, the date of the death of the testator, and also a further return for the period from November 30, 1916, to December 31, 1916. But each return was accompanied by a protest in writing that they were not required to make a return or to pay an income tax. The respondent nevertheless levied the assessments, the amount of which if the income is taxable is not in dispute, and, an application for abatement having been denied, the taxes were paid under protest, and the petitioners appealed as provided in St. 1916, c. 269, § 20.

The testator having been domiciled in this Commonwealth, the validity of the tax depends upon the construction to be given to St. 1916, c. 269, § 8, the material portion of which reads, "The income received by persons since deceased shall be taxed to their estates." By § 1, a tax "upon incomes" is to be levied "in the year nineteen hundred and seventeen, and in each year thereafter." The tax year therefore began to run from January 1, 1917, and the words "since deceased" refer only to the estates of those who died after the commencement of its operation. *J. L. Hammett Co. v. Alfred Peats Co.* 217 Mass. 520, 522, and authorities there collated. While § 2 provides, that "Income of the follow-

ing classes received by any inhabitant of this Commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum," the statute is not declared to be retroactive as to the estates of deceased persons; nor can it be extended by implication. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329. *Brooks v. West Springfield*, 193 Mass. 190, 194. As the testator died in the preceding year the taxes were unlawfully imposed and must be repaid to the petitioners "by the treasurer and receiver general, with interest at the rate of six per cent per annum from the time when the tax was paid, and costs." St. 1916, c. 269, § 20.

So ordered.

ELIZABETH M. WADLEIGH vs. KIRK BUMFORD.

Middlesex. November 13, 1917. — January 4, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Res ipsa loquitur. Landlord and Tenant, Falling of plaster of ceiling.

The fact that a part of the plaster of the ceiling of the kitchen of a tenement fell on the tenant about two weeks after an authorized agent of the landlord had replastered the ceiling, if wholly unexplained, is no evidence of a defect in the plaster or of negligence or want of skill in laying it.

TORT for personal injuries sustained by the plaintiff on May 21, 1915, from the falling on her of a part of the ceiling of the kitchen of the tenement occupied by her as a tenant on the ground floor of a three floor six tenement house numbered 180 on Main Street in Everett owned and controlled by the defendant. Writ dated July 7, 1915.

In the Superior Court the case was tried before *Chase, J.* The evidence, which was conflicting, is described in the opinion. At the close of the evidence the judge refused to order a verdict for the defendant. The defendant then asked the judge to make, among others, the following rulings:

"1. On all the evidence presented a verdict should be directed for the defendant.

"2. The mere falling of a portion of the plaster of the ceiling is no evidence in and of itself of improper or negligent repair of

the plaster, even though there is evidence that such falling occurred within two or three weeks of the time when the repairs to that portion of the ceiling that fell were made."

"8. There was no evidence offered by the plaintiff that the person who did the repairs to the ceiling was unskilled, that the materials used were unsuitable or that the subsequent fall of the plaster was a direct result of the manner in which the repairs were made, and a verdict should be directed for the defendant."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$700. The defendant alleged exceptions.

F. J. Carney, (E. N. Carpenter with him,) for the defendant.

M. F. Cunningham, (J. A. Pagum with him,) for the plaintiff.

PIERCE, J. While a tenant of the defendant the plaintiff was injured by the falling upon her of a part of the ceiling in the kitchen of her tenement. Upon disputed evidence the jury could have found that about two weeks before the accident an agent of the defendant, duly authorized to make repairs on behalf of the defendant, had replastered the ceiling which fell upon the plaintiff. Other than such inference as may be drawn from the fall of the plaster, no evidence was offered to prove either faulty composition of the material used or unskilled and unworkmanlike application of the coating to the ceiling. Nor was there any evidence to exclude the inference of the operation of other causes which might have produced the accident. We are of opinion that the mere occurrence of the accident raised no presumption against the defendant.

The motion to direct a verdict should have been allowed. The exceptions must be sustained and judgment entered for the defendant under St. 1909, c. 236.

So ordered.

ANNA BISBEE vs. KIERAN McMANUS.

Suffolk. November 14, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Infant, Liability of father. Sale, Ratification. Practice, Civil, Rulings and instructions.

In an action to recover the price of hats and veils furnished to infant daughters of the defendant to wear at the funeral of their mother, if it appears "that the defendant neither expressly nor impliedly authorized the purchase of the goods," but it appears that he permitted his minor daughters to use the articles, which were purchased by them from the plaintiff with his knowledge, and that he afterwards offered to pay a certain price for the articles, which his daughters asserted was the agreed price, it can be found that he adopted and ratified the purchase.

In the same case it appeared that the defendant was a workman earning \$18 a week, and it was *held* that it could not be ruled as matter of law that the four hats and two veils furnished to the defendant's four minor daughters for the total price of \$14 to wear at their mother's funeral were not in the class of necessities.

In the same case the plaintiff claimed \$14 as the reasonable price of the hats and veils, and the defendant's evidence tended to prove an express contract of the plaintiff with the daughters to furnish the hats and veils for \$8. The judge refused to rule at the defendant's request "That if the plaintiff is entitled to recover in any amount then that amount cannot exceed the amount agreed upon by and between the plaintiff and the defendant's daughters." *Held*, that the refusal of the judge was right, as the ruling refused assumed the truth of a disputed fact.

CONTRACT on an account annexed for \$14 as the price of four mourning hats and two mourning veils furnished to the defendant for the use of his minor daughters. Writ in the Municipal Court of the City of Boston dated March 3, 1916.

The evidence at the trial in the Municipal Court is described in the opinion. The defendant asked the judge to make five rulings. Of these the judge made the third, which was as follows: "That the defendant neither expressly nor impliedly authorized the purchase of the goods set forth in the account annexed."

The other rulings requested by the defendant were as follows:

"1. That upon all the evidence the plaintiff is not entitled to recover.

"2. That upon all the evidence and the pleadings the plaintiff is not entitled to recover."

"4. That if the plaintiff is entitled to recover in any amount then that amount cannot exceed the amount agreed upon by and between the plaintiff and the defendant's daughters.

"5. That 'hats' and 'veils' are not 'necessaries.'"

The judge refused to make any of these rulings and found for the plaintiff in the amount set forth in the account annexed. At the request of the defendant he reported the case to the Appellate Division.

The Appellate Division made an order that the report be dismissed, and the defendant appealed.

The case was submitted on briefs.

B. J. Killon, for the defendant.

J. F. Myron, for the plaintiff.

PIERCE, J. This was an action of contract on an account annexed, to recover \$14 for four hats and two veils sold and delivered to the daughters of the defendant on his credit.

The evidence for the plaintiff shows that the defendant was in the employ of the city of Boston earning \$18 per week; that his wife died on December 27, 1915; that the plaintiff came to his house on the morning of the death of the wife; that four minor daughters lived at home; that the two oldest daughters asked the plaintiff to make and procure for them and for the two younger children hats and veils to be worn at the funeral of their mother; that the hats and veils were delivered; that the price was not agreed upon; that the price charged was reasonable; that the defendant was present during the conversation in which the hats and veils were ordered, but took no part in it; that the daughters were told the price four days after the funeral and they stated that their father would not pay so much; that demand was made upon the defendant eleven days after the funeral and he said he would ask his daughters about the matter, and later he offered the plaintiff \$8 and refused to pay more.

The evidence for the defendant tended to prove an express contract to furnish hats and veils for \$8; that the defendant did not authorize his daughters to purchase hats and veils from the plaintiff and that he had never previously authorized his daughters to purchase hats from the plaintiff.

The presiding judge found for the plaintiff for the full sum set forth in the account annexed. His ruling "That the defendant

neither expressly nor impliedly authorized the purchase of the goods set forth in the account annexed," is not inconsistent with a finding that the defendant adopted and ratified the contract by permitting his minor children to retain and use the articles purchased from the plaintiff with his knowledge, as also by his offer to pay the price which his daughters contended was the sum stipulated to be paid.

Upon the evidence it cannot be said that hats and veils for the purpose purchased are not within the class of "necessaries." Nor could it have been ruled that upon all the evidence and the pleadings the plaintiff was not entitled to recover. The request to rule "That if the plaintiff is entitled to recover in any amount then that amount cannot exceed the amount agreed upon by and between the plaintiff and the defendant's daughters," assumes the proof of a disputed fact, and was refused rightly.

Order dismissing report affirmed.

MYER RUBIN vs. SAMUEL I. HUHN.

Suffolk. November 15, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of gratuitous bailee. Bailment, Gratuitous. Conversion.

Where in the crowded lobby of a theatre a person was handed a box containing a pair of diamond earrings and was asked to examine and appraise them without reward and where as he was handling them he "dropped one of the earrings and it was lost," such person, who was only the gratuitous bailee of the earrings, cannot be held liable to their owner for the loss, there being no evidence to warrant a finding of gross negligence on his part.

In the case stated above there was a count for an alleged conversion, and there was evidence that the plaintiff demanded of the defendant the return of the earrings and that the defendant then said that, if the plaintiff would refrain for a short time from bringing an action against the defendant for the loss of the earrings, he would pay the plaintiff for them a sum of money named, that the plaintiff did so refrain for such time but that the defendant did not pay to the plaintiff the sum named nor return both or either of the earrings. *Held*, that there was no evidence of a conversion of both earrings by the defendant.

In the same case there was evidence that the defendant, being in possession of the remaining earring, refused upon the plaintiff's demand to deliver it to the plaintiff, and there also was evidence that the defendant delivered this remaining earring to a person not authorized to receive it. *Held*, that on this evidence a

finding that there was a conversion by the defendant of the remaining earring was warranted.

In the same case it was *held*, that, as the defendant properly could be held liable for the value of one earring at the time of its conversion, the trial judge was right in refusing to rule "that upon all the evidence judgment must be directed for the defendant."

CONTRACT or TORT for the value of a pair of diamond earrings, the declaration alleging in the first count, that the earrings were entrusted to the defendant who promised to return them and failed to do so, in the second count, that on September 15, 1914, the defendant to whom the earrings had been entrusted refused to return them upon demand, in the third count, that on September 15, 1914, the defendant converted to his own use the earrings, which were of the value of \$90, and in the fourth count that the defendant owed the plaintiff \$90 according to an account annexed. Writ in the Municipal Court of the City of Boston dated January 25, 1915.

At the trial in the Municipal Court the plaintiff introduced evidence which tended to show that the plaintiff, being the owner of a pair of diamond earrings, allowed one Wyner, who was a partner in the theatre business of one Levitan and who sometimes sold goods for the plaintiff, to take them into his possession to sell them to Levitan, but that the title to them and the entire beneficial interest in them remained in the plaintiff; that afterwards, in September, 1914, Wyner, Levitan and the defendant were in the lobby of a theatre in Boston, and that Wyner handed the earrings to the defendant, enclosed in a box, and that the defendant took them into his hands to inspect and examine and appraise them; that at that time the lobby was crowded with people, about two hundred in number; that the defendant, having received the earrings into his hands, carried the earrings a short distance across the lobby to a place near a light for the purpose of examining them, and that the defendant dropped one of the earrings and it was lost, and that the plaintiff has not since received it; that afterwards the defendant went to the plaintiff's store and talked with the plaintiff, that the plaintiff then demanded the earrings, and that the defendant then told the plaintiff that, if he would refrain for a short time from bringing an action against the defendant for the loss of the earrings, he, the defendant, would pay the plaintiff \$85; that the plaintiff did so refrain for

such time, but that the defendant did not pay that sum to the plaintiff and did not return either or both of the earrings to the plaintiff or to Wyner.

The defendant testified that, while he was standing in the lobby, Wyner and one Levitan came to the defendant and asked him to appraise the earrings, Wyner saying to Levitan, "Here is Mr. Huhn, he will tell you what they cost;" that the defendant took the earrings from either Levitan or Wyner and, as he opened the box, one of the earrings dropped on the floor and was not recovered although the loss was reported to the police; that the defendant's promise to the plaintiff at the plaintiff's store to pay for the earrings was made by him on behalf of Levitan who had sent him to adjust the loss and that he returned the one earring to Levitan from whom he had received it.

The judge found the facts to be those put in evidence by the plaintiff. He found that the defendant, in handling and dealing with the earrings did not exercise such care as a reasonably prudent man would have exercised under the circumstances, but handled and dealt with them in a careless and negligent manner. He found that, before the bringing of the action, the plaintiff demanded the earrings of the defendant and that the defendant did not return either or both of them to the plaintiff or to Wyner.

At the close of the evidence the defendant asked the judge to rule "that upon all the evidence judgment must be directed for the defendant." The judge refused so to rule and "found for the plaintiff in tort for \$85," which he found to be the value of the two earrings. At the request of the defendant the judge reported the case to the Appellate Division.

The Appellate Division made the order, "Report dismissed," and the defendant appealed.

W. Hartstone, for the defendant.

S. Sigilman, for the plaintiff, submitted a brief.

PIERCE, J. The defendant assumed at most the obligation of a gratuitous bailee when, in the lobby of a theatre crowded with people, he received from one Wyner a pair of diamond earrings in a box and at the request of Wyner then and there undertook to inspect, examine and appraise them without reward. *Foster v. Essex Bank*, 17 Mass. 479. The duty which the law imposes on gratuitous bailees is that the bailee shall act in good faith, that is,

shall use the degree of care in the performance of the undertaking which is measured by the carefulness which the depository uses toward his own property of similar kind under like circumstances. *Foster v. Essex Bank*, *ubi supra*. *Whitney v. Lee*, 8 Met. 91. *Smith v. First National Bank in Westfield*, 99 Mass. 605.

In an action of contract or of tort for breach of duty imposed by law, the mere fact "that the defendant dropped one of the earrings and it was lost," is not sufficient evidence of his gross negligence to warrant a finding for the plaintiff. The finding of the judge "that the defendant, in handling and dealing with the earrings did not exercise such care as a reasonably prudent man would have exercised under the circumstances," imposed upon the defendant, a gratuitous bailee, a standard of care which measures the duty of a bailee for hire. This was manifest error.

Upon the reported facts the failure to return the lost earring is not a conversion. "The action of trover is not maintained by proof of negligence, but only of misfeasance amounting to a conversion." *Foster, J.*, in *Hall v. Boston & Worcester Railroad*, 14 Allen, 439, 443.

As regards the other earring, the facts found warrant a finding that the defendant, in the possession of the earring, on demand refused to deliver it to the owner, the plaintiff. Moreover, the testimony of the defendant would warrant a finding that he delivered the earring to a person unauthorized to receive it by the owner or by the person from whom the defendant received it. An action of trover will lie upon either view of the facts. *Devereux v. Barclay*, 2 B. & Ald. 702. *Clafin v. Boston & Lowell Railroad*, 7 Allen, 341. *Saxon Mills v. New York, New Haven, & Hartford Railroad*, 214 Mass. 383, 391, and cases cited.

At the close of the evidence the defendant asked the judge to rule "that upon all the evidence judgment must be directed for the defendant." In effect, this was a request to rule that the evidence was insufficient in any legal form of declaring to justify a finding for the plaintiff for any amount. *Ideal Leather Goods Co. v. Eastern Steamship Corp.* 220 Mass. 133. *Brown v. Pelonsky*, 210 Mass. 502, 506. The request was refused rightly.

However, it is manifest that judgment should not be entered for \$85, the value of both earrings, but should be in such amount as upon hearing shall be determined was the value of the single

earring at the time it was converted. *Loanes v. Gast*, 216 Mass. 197, 199.

It follows that the order of the Appellate Division of the Municipal Court of the City of Boston, "Report dismissed," must be affirmed.

So ordered.

MARION STREET GARAGE COMPANY vs. WALTER J. SUGDEN.
WALTER J. SUGDEN vs. MARION STREET GARAGE COMPANY &
others.

Suffolk. November 19, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Garage. Equity Jurisdiction, To restrain unlawful interference with business.
Equity Pleading and Practice, Appeal.

In a suit in equity, by a corporation established for the purpose of carrying on the business of a public garage and licensed to conduct such a business, to restrain alleged unlawful interference with its business, the bill must be dismissed if the plaintiff fails to prove that it was engaged in the business of carrying on a public garage.

On an appeal from a final decree in a suit in equity, where there is no report of the evidence, the only question for this court is whether the decree conforms to the allegations of the bill and lawfully can be entered on the facts found by the trial judge.

BILL IN EQUITY, filed in the Superior Court on November 14, 1916, by the Marion Street Garage Company, a corporation established under the laws of this Commonwealth, alleging that the plaintiff had been granted a certificate giving it the right to do business as a public garage at 39 Marion Street in Brookline, and that the defendant had interfered unlawfully with its business by bringing an action against one Carpenter, the manager of the plaintiff's garage business, in which upward of fifty persons had been summoned as trustees, and praying for an injunction and for damages; and a

BILL IN EQUITY, filed in the Superior Court on December 11, 1916, by Walter J. Sugden, the defendant in the first bill, alleging that the plaintiff on May 15, 1915, purchased from one Davis the business of a public garage at 39 Marion Street in Brookline,

which he afterwards sold to Carpenter named in the first bill, who gave to the plaintiff a mortgage to secure a balance of the purchase money, that the plaintiff also obtained from Davis a lease of the premises, which he afterwards with the consent of Davis sublet to Carpenter, and that Carpenter had committed a breach of the covenants in his sublease by underletting the premises without the consent or knowledge of the plaintiff or of Davis, whereupon the plaintiff entered and took possession of the leased premises; praying that the Marion Street Garage Company and the other defendants be enjoined from removing from the premises certain records, accounts and property mortgaged to the plaintiff by the defendant Carpenter.

The suits were heard together by *Lawton, J.*, who made the findings that are stated in the opinion. The finding of the judge which is referred to in the opinion as disposing of the first suit was as follows: "In the case of the Marion Street Garage Company against Sugden, the first paragraph alleges that the plaintiff corporation was duly organized and granted a certificate, and I so find. I am not able to find that the second part of the first paragraph, namely, 'and on July 6, 1916, began and has since continued to do a public garage business at 39 Marion Street in said Brookline,' is true. I find that to be a fact which Kaine says he told Rowley on August 31, 'We have waited till this time before the corporation takes over the business.' There is no evidence that at or after that date the corporation 'took it over.' Carpenter does not say when he wrote the assignment or why he did it rather than to have his lawyer Kaine do it. He says he delivered 'the papers' to the company July 8. Kaine says that when Carpenter handed him the Sugden-Carpenter lease the assignment was already written on it. I am not satisfied of this or that the lease was ever delivered to the corporation. There are no records of meetings of the corporation or directors after the record of July 6."

By order of the judge final decrees were entered in favor of Walter J. Sugden in both suits. The plaintiff in the first case and the defendants in the second case appealed.

E. I. Smith, for the Marion Street Garage Company and others.

C. W. Rowley, for Walter J. Sugden.

PIERCE, J. Without a report of the evidence these cases are before us on appeal from a final decree in favor of the defendant in the first suit and against the defendants in the second suit in accordance with a finding of facts made by the trial judge.

On the facts found by the trial judge, the Marion Street Garage Company completely failed to prove at the hearing that it was engaged in a public garage business at 39 Marion Street, Brookline, at the time it charged Sugden with an interference with its business in the manner and form set out in its bill and in the several amendments thereto. The absence of proof of this fundamental and foundational fact necessitated the dismissal of the bill.

As regards the suit of Sugden against the Marion Street Garage Company the only question open is whether the decree conforms to the allegations of the bill and lawfully could be entered on the facts found. *Gordon v. Borans*, 222 Mass. 166.

The facts stated in the bill, which are either admitted by the answer or found to be true by the trial judge, in substance are as follows: Walter J. Sugden on or about May 15, 1915, purchased of one Davis the business of a public garage. The property acquired consisted of the good will of a long established business and divers chattels used in and appurtenant to the business sold. Coincident with the purchase and sale of the business, Davis, who owned the real estate upon which the garage was located, executed a lease of the garage to Sugden for a term of ten years. The lease contained a covenant not to assign or underlet the premises without the consent in writing of Davis. On or about June 1, 1916, the defendant Carpenter purchased of Sugden the good will of the garage business and certain personal property for \$12,500, paying Sugden \$5,000 on account of the purchase price and executing and delivering his promissory note for the balance, secured by a mortgage of the good will and other property sold. Coincident with the purchase by Carpenter of the property and business, Sugden executed and delivered to Carpenter a written lease of the premises "for the Term of Nine (9) years beginning with the Fifteenth day of May A. D. 1916." Davis gave his written consent to Sugden in terms as follows: "Boston, June 8, 1916. Permission is hereby given Walter J. Sugden to underlet the premises described in a lease dated fifteenth day of May,

1915, from me to said Sugden of premises on Marion St. in Brookline, Massachusetts, to Fred A. Carpenter; but this consent is given on the express condition and understanding that it shall not operate as a waiver of any provision in said lease and shall not authorize any further or other sublease without express consent, and shall in no way affect the liabilities and obligations of said Sugden under the lease first above mentioned." The lease to Carpenter contained a covenant that Carpenter would not assign or underlet the whole or any part of the leased premises, and that he would at the end of the term peaceably deliver up the leased premises to Sugden.

On June 12, 1916, a charter was issued to a corporation under the name and style of the Marion Street Garage Company. This corporation had a nominal capital of \$15,000 with fifteen hundred shares at \$10 each. It was created to take over the personal property, machinery, automobiles and good will of the business of the garage then owned by Carpenter under purchase from Sugden, and to allow itself to be used by Carpenter as a means of carrying on his own business. No money was ever paid by the corporation to Carpenter and the only money paid to any one was the \$5,000 paid to Sugden by Carpenter, which he received in part from an employee, in part from a brother, and the balance from his wife.

Sometime after receiving the lease, Carpenter wrote on the back of it as follows: "Brookline, July 6th, 1916. In consideration of one dollar and other and valuable considerations I hereby transfer and assign and set over all of my right, title and interest to the within lease from Walter J. Sugden to Fred A. Carpenter, Atty. to The Marion Street Garage Co. Corporation Fred A. Carpenter Atty. (Seal.)"

The trial judge refused to find and rule that Sugden consented to the last named assignment, that he waived the condition not to assign or that he was estopped from asserting any breach of the condition not to assign; and specifically and affirmatively found: "No consent . . . to the assignment, no waiver of the condition . . . against assigning and no facts which should estop him from asserting a breach of that condition or covenant."

No notice was given to Sugden or Davis of the assignment by Carpenter to the Marion Street Garage Company. Sugden did

not know of the assignment until November 24, 1916, and "Davis, who lives near the garage, supposed the garage was let to Carpenter, and had never heard of the Marion Street Garage Company till about December 1," 1916.

The lease from Davis to Sugden provided that "until further notice from the lessor rent shall be paid to the Cambridge Trust Co." For August, 1916, and thereafter, the rent was paid monthly to the Cambridge Trust Company by checks which had printed on the left hand margin the words "Marion Street Garage Co," and at the bottom "Marion Street Garage Co . . . Mgr.," a blank space being left for the written signature of F. A. Carpenter. It is the contention of the defendant that the lease given it was an assignment and not an underlease, and that Davis had accepted it as tenant by reason of the acceptance of the rent paid to the Cambridge Trust Company. The trial judge refused so to rule and it cannot be said he was clearly wrong in view of all the facts, and more particularly, because of the doubt expressed by the judge as to whether the lease ever was delivered to the corporation. In these circumstances the defendants were estopped to deny the title of Sugden or of his right to make the lease, under which Carpenter entered. It follows that Sugden legally could determine the lease by entry for breach of the covenant of Carpenter not to assign.

On December 1, 1916, Sugden made an open, peaceable and unopposed entry upon the premises for the purpose of terminating the lease for breach of condition thereof. Keepers placed in charge of the premises were assaulted and forcibly ejected therefrom by the defendants Kaine and Roberts. The defendants admit default on the mortgage note in that the sums to be paid were not paid and the property was not insured against fire for the benefit of the mortgagee. On December 4, 1916, Sugden took possession of all the property described in the mortgage which was then upon the premises for breach of condition thereof, and placed it in the custody of keepers. On the same day the defendants Kaine, Carpenter and Roberts, assaulted the keepers, took from them the property described in the mortgage and forcibly ejected them from the premises; and have since retained possession of the premises and property through show of force and threat of violence.

We discover no reversible error in the refusals to rule as requested or to make additional findings of fact. The decree was fully warranted by the frame of the bill, the prayers thereof, and the reported facts. *O'Brien v. Murphy*, 189 Mass. 353, 357.

The entry in each case must be

Decree affirmed with costs.

WILLIAM DOHERTY vs. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD COMPANY.

Suffolk. December 4, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Railroad, Trespasser or licensee.

In an action against a railroad corporation for personal injuries sustained from being run into by a train of the defendant operated by electricity on a local branch line leading to the seashore, when the plaintiff was crossing or had crossed the parallel tracks of the defendant and was on or very near the track on which the train that struck him was running, where the defendant's engineer in charge of the train testified that he had a clear view of several hundred feet and that he perceived the plaintiff crossing the tracks, and where there was other testimony that the train when a hundred and fifty or a hundred and sixty yards away slowed down and thereafter greatly increased its speed, it was held that there was evidence of negligence on the part of the defendant's engineer, but that there was no evidence of such misconduct, wilful, wanton, reckless or intentional as would make the defendant liable for the plaintiff's injuries if he was a trespasser or a mere licensee.

In the case described above there was evidence, that the plaintiff was about to take a train to return home from the beach and that he had been waiting in an open station or shed, when he saw the train that he wished to take approaching on the farther from the station of the two tracks, that the space between the station and the first track was filled in to the top of the rails, that the space in front of the station between the rails of the first track and the adjoining space between the two tracks also were filled in to the top of the rails, but that the space between the rails of the second track was not filled in and outside the rails of that track there was no filling and the ends of the sleepers were exposed, that beyond the ends of the sleepers there was a slight depression or gutter or path, beyond which was a riprap wall above the beach to protect the station and the tracks from the action of the sea, that when taking the train on the farther track the majority of persons got on the train from the station side but that persons also got in on both sides, that the plaintiff when he saw his train coming stepped from the platform of the station and crossed the first track and the space between the tracks and entered the space between the rails of the

farther track and, as he did so, saw that the train was close to him and jumped but was struck by the train. The plaintiff testified that "There was no crowd there or anything to force me to go over to that side to take the train, but I wanted to get on the right hand side and get a train. I went over there voluntarily and of my own accord." Held, that the plaintiff at the time of his injury was not a passenger and was a trespasser or at most a mere licensee to whom the defendant owed no duty other than to refrain from wilfully, recklessly or wantonly exposing him to danger.

In the case above described it was said that the evidence of the use by persons of the outer space in getting upon trains on the farther track merely tended to show that the defendant had tolerated such a practice without taking measures to prevent it, and did not tend to show an invitation from the defendant to use that space.

TORT for personal injuries sustained on September 5, 1915, near the Stony Beach station on the Nantasket branch of the defendant's railroad from being run into negligently by a train of the defendant when the plaintiff was alleged to have been a passenger of the defendant. Writ dated October 11, 1915.

The defendant's answer contained a general denial and an allegation that the plaintiff was guilty of negligence which contributed to his alleged injury.

In the Superior Court the case was tried before *Brown, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for it. The judge refused to do this. The defendant then asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. Upon all the evidence the plaintiff was not in the exercise of due care.

"3. At the time of the accident the plaintiff was not a passenger."

"5. When the plaintiff stepped from the gravel fill between the two tracks on to the exposed sleepers or ties between the rails of the Pemberton bound track, he became a trespasser, or at most a mere licensee, and this was his *status* at the time of the accident."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$600. The defendant alleged exceptions.

Joseph Wentworth, for the defendant.

C. J. Muldoon, Jr., (*J. J. O'Hare* with him,) for the plaintiff.

PIERCE, J. On September 5, 1915, while crossing, or immediately upon leaving, the tracks of the electric railroad of the de-

fendant, the plaintiff was struck by and received physical injury from contact with the right hand running board or step of the first car of an electric train running from Nantasket Beach to Pemberton. The evidence would not warrant a ruling that the defendant had affirmatively proved that the plaintiff was not in the exercise of due care. *Patrick v. Deziel*, 223 Mass. 505, 508. *Nye v. Louis K. Liggett Co.* 224 Mass. 401, 404. *Regan v. Boston & Maine Railroad*, 224 Mass. 418. *Murphy v. Worcester Consolidated Street Railway*, 225 Mass. 264. *Winslow v. New England Co-operative Society*, 225 Mass. 576. *Creedon v. Galvin*, 226 Mass. 140. *French v. Mooar*, 226 Mass. 173. *Bullard v. Boston Elevated Railway*, 226 Mass. 262. *Kelsall v. New York, New Haven, & Hartford Railroad*, 196 Mass. 554. *La Fond v. Boston & Maine Railroad*, 208 Mass. 451.

The testimony of the engineer that he had a clear view of seven hundred feet and that he perceived the plaintiff crossing the tracks, when taken with other testimony that the train slowed down when a hundred and fifty to a hundred and sixty yards away and thereafter greatly increased its speed, furnished some evidence of the negligence of the engineer, but was entirely inadequate to warrant a jury in finding that such misconduct was wilful, wanton, reckless or intentional.

The remaining question is whether the plaintiff was a passenger, trespasser or licensee when injured. The uncontroverted evidence bearing upon this question was as follows: Stony Beach station, at or near which the plaintiff was injured, "is an open shed approximately forty feet long, ten feet deep in the centre and six feet deep on the two ends. The station is more of a waiting shed than a regular station. The eaves overhang the building approximately two feet. The front of the station is about ten feet from the nearest rail. The space in front of the station between it and the nearest rail was filled with gravel to the top of the rail and the gravel fill extended for a distance of about two hundred thirty-five feet. There were two tracks and the space in front of the station between the rails of the nearer track was filled in even with the top of the rails for a distance of approximately ninety-five feet. The space in front of the station between the two tracks was filled in to the top of the rails for a distance of approximately two hundred thirty-five feet. The space between

the rails of the track farther from the station was not filled in and the ties or sleepers were exposed. The Nantasket bound track is the one nearer the station; the Pemberton bound track is the one farthest from the station. Outside the rails of the Pemberton bound track farther from the station there was no filling and the ends of the sleepers were exposed. Beyond the ends of the sleepers was a slight depression or gutter or path and just beyond that was a riprap wall to protect the station and tracks from the action of the sea, and beyond the riprap wall was the beach and then the ocean. The stones in the wall were of various sizes, shapes and distances from the track, the testimony being that they varied from two to six feet from the ocean side rail of the Pemberton bound track. The track is straight in front of the station or shelter shed. About one thousand feet toward Nantasket, from the Stony Beach shed, the track starts on a sweeping curve, which continues for several hundred feet."

On the day of the accident the plaintiff had come from his home in Boston to Stony Beach. Following his arrival he went with friends over the tracks and rocks and sat down on the beach a short distance from the water. After sitting there fifteen or twenty minutes, the plaintiff did not feel well and decided to go home. He walked up the rocks and across the tracks to the station for the purpose of taking a train to Pemberton. After sitting in the station five or six minutes he heard the noise of a train; he walked to the end of the platform, looked toward Nantasket and saw the train coming from that direction. It was bound for Pemberton which was where he desired to go. After again looking in the direction of the coming train he stepped from the platform, crossed the Nantasket bound track, then the space between that track and the Pemberton bound track (a distance of ten feet), and then entered upon the space between the rails of the last track. As he did so he saw the train was close to him. He jumped, and was struck by the right hand side of the train. He testified: "I had crossed over those rocks twice that day, once going down to the beach and once coming back. There was no crowd there or anything to force me to go over to that side to take the train, but I wanted to get on the right hand side and get a train. I went over there voluntarily and of my own accord."

There was evidence that during the summer of 1915 a great

majority of the people got on the train from the station side when the train was going to Pemberton, but there was also evidence that they got in on both sides.

We think the physical situation of the station, the fact that the space in front of the station between it and the nearest rail was filled with gravel to the top of the rail, the fact that the space between the rails of the track nearer the station was filled in even with the top of the rails, the fact that the space between the track nearer the station and the track farther from the station was filled in level with the rails, the fact that the space between the rails of the farther track was not filled in, the fact that the sleepers were uncovered and exposed and extended beyond the farthest rail, the fact that the cars overhung the space between the farthest rail and the rocks eighteen inches, and the fact that the path or gutter beyond the sleepers was but a depression worn out between the ties and the rocks, all together establish indubitably that the place to which the public in entering and leaving the trains was invited was the space made level for such purpose between the station and the nearer rail of the Pemberton bound track, and exclude plainly from such invitation the manifestly narrow, inappropriate and dangerous space between the ends of the sleepers and the rocks.

The evidence of use of the outer space goes no further than to show that the defendant had tolerated a practice without taking active measures to prevent it. This is far from an inducement or invitation from the defendant to use that space. *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225, 229. *Legge v. New York, New Haven, & Hartford Railroad*, 197 Mass. 88. *Hillman v. Boston Elevated Railway*, 207 Mass. 478.

It follows that the plaintiff was not a passenger at the time of the injury, and was a trespasser or, at most, a mere licensee, to whom the defendant owed no duty other than to refrain from wilfully, recklessly and wantonly exposing him to injury. *Youngerman v. New York, New Haven, & Hartford Railroad*, 223 Mass. 29. *Albert v. Boston Elevated Railway*, 185 Mass. 210. *Kallio v. Worcester Consolidated Street Railway*, 222 Mass. 121, 123.

The motion to direct a verdict for the defendant should have been allowed. The exceptions must be sustained and judgment entered for the defendant under St. 1909, c. 236.

So ordered.

GEORGE W. MITTON & others, executors, *vs.* TREASURER AND
RECEIVER GENERAL.

Norfolk. December 5, 6, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions. Tax Commissioner.

The widow of a testator having died, the provisions of his will as to the residue of his estate, which took effect upon her death, were that the trustees to whom such residue was given should hold it for twenty-five years and pay to his children the net yearly income in equal shares, but not to exceed \$150,000 in any one year, for a period of ten years, if any further income accrued, it was to be added to the principal and, at the end of the period of ten years, the entire net income was to be distributed among his children, the issue of any deceased child taking by right of representation, and, when the period of twenty-five years ended, the principal was to be distributed equally among his children then living and the issue of any deceased child by right of representation, and, if none of them were living, it was to be distributed as if he then had died intestate. *Held*, that the interests of the children in the gifts of income for the first ten years, having vested in possession, were subject to the legacy tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1.

Upon a petition under St. 1909, c. 490, Part IV, § 21, by the executors of the will above described praying for the determination of questions in regard to the legacy and succession taxes due upon the estate of the testator, it was *held*, that under St. 1909, c. 490, Part IV, § 4, executors who have performed their present duties are not entitled to instructions as to what their duties may be upon the happening of future events with which they may have no official connection, and accordingly this court refused to instruct the petitioners as to what legacy taxes would be payable at the expiration of the period of ten years mentioned above.

In the same case it was *held* that one of the petitioning executors, who also joined in the petition individually as a beneficiary of income and as one of the remaindermen, would be entitled under St. 1909, c. 490, Part IV, § 7, to have the tax upon his future interest determined and certified, if he was "willing to waive the right to a possible diminution in the value of his interest by the birth of additional issue" and if the tax was susceptible of computation; but in the present case owing to elements of uncertainty the Tax Commissioner determined that it was impossible to compute the present value of the future interest.

In the same case it also was *held* that, upon an application under St. 1909, c. 490, Part IV, § 7, to the Tax Commissioner to determine the actual value of the interest of the petitioner or to exercise the power given him by that section, where it is impossible to compute the present value of the future interest, in order to effect, with the approval of the Attorney General, such a settlement of the tax as he shall deem to be for the best interests of the Commonwealth, if the Tax Commissioner commits no error of law, his decision of fact that the present value of the petitioner's interest cannot be computed is final, and whether he will, with the approval of the Attorney General, effect a settlement

of the tax rests wholly in the exercise of his sound discretion and judgment, and his refusal to exercise the power is not reviewable.

PETITION, filed in the Probate Court for the county of Norfolk on January 27, 1917, under St. 1909, c. 490, Part IV, § 21, by the executors of the will of Edward J. Mitton, late of Brookline, and by George W. Mitton, individually, as one of the legatees under that will, praying for the determination of questions in regard to the legacy and succession taxes due upon the estate of the testator. The questions which the petitioners prayed the court to determine were as follows:

"1. What interests passing to the children of the testator under said will are presently taxable.

"2. Whether your petitioners are entitled to have the tax upon the entire estate certified and determined.

"3. Whether your petitioners are entitled to a settlement of the tax upon the basis of the present value of the estate and a rate determined by having all elements which create uncertainty in respect to the value of each interest and consequently as to the rate of taxation thereon and render it impossible to compute considered in the light most unfavorable to them.

"4. Whether said George W. Mitton is entitled to have the tax upon his future interest determined and certified if he is willing to waive the right to a possible diminution in the value of his interest by the birth of additional issue."

The Probate Court made a decree "that the only interests of the children of the testator in the trust of the residue of his estate created by the third paragraph of his will upon which legacy and succession taxes are due and payable at the expiration of two years after the date of the giving of bonds by said executors are the interests of said children in the income of the trust during the life of the widow and for a period of ten years after his death; that legacy and succession taxes upon the additional interests in the income of the trust for the remainder of the ten year period only which came into the possession and enjoyment of the children of the testator upon the death of the widow of the testator became due and payable at the expiration of one year after the death of the widow; that all the remaining interests in said trust, particularly including the interests of the children of the testator and their issue in the income of the trust after the expiration of

the ten year period and until the termination of the trust, and all interests in the principal of the trust, are interests which take effect in possession or enjoyment after the expiration of a life estate or a term of years, and that, it being impossible to compute the present value of said remaining interests, the executors are entitled now to pay taxes thereon only in the event that the Tax Commissioner, with the approval of the Attorney General, shall enter into an agreement with them effecting such a settlement of the amount of said taxes as he shall deem to be for the best interests of the Commonwealth; and it further appearing that the executors have now paid all taxes due and payable upon the interests of the children of the testator in the income of the trust for the ten year period both during and after the life of the widow, and that no agreement has been entered into with the Tax Commissioner, approved by the Attorney General, for the settlement of any taxes upon any non-computable interests, it is further decreed that the executors are not now entitled to have determined or to pay any further taxes on account of said estate, such taxes not being payable until the expiration of one year after said remaining interests come into the possession or enjoyment of the beneficiaries of said trust."

The petitioners appealed. The appeal was heard by *Crosby, J.*, who made certain findings of fact, including the facts that are stated in the opinion, and reserved the case upon the petition, the answer, the decree of the Probate Court, the appeal and the findings of fact made by him for determination by the full court.

P. Nichols & E. H. Abbot, Jr., for the petitioners.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

BRALEY, J. By the residuary clause of the will as modified by the second, fourth, fifth and sixth articles, the testator created a trust for the benefit of his wife and children. The trustees were to hold the estate for twenty-five years after his death and until the death of his wife, but in no event longer than twenty-one years after the death of the last survivor, and pay from the net yearly income \$50,000 annually to his wife for life, and to his children the remainder in equal shares but not to exceed \$100,000 (changed by the codicil to \$150,000) in any one year for a period of ten years, the issue of any deceased child to take by right of representation. If any further income accrues it is to be added to prin-

cipal, and at the end of the period of ten years the entire net income in excess of \$50,000 is to be distributed among the children, the issue of any deceased child taking by right of representation. But, the testator's wife having died about eighteen months after his decease, her life estate terminated, and the trustees then were to distribute the net income, not however exceeding \$150,000 in any one year, for the first ten years after his death, and upon the expiration of ten years, the entire net income in equal shares among his children, the issue of any deceased child to take the parent's share. When the period of twenty-five years ends, the principal is to be divided equally between his children then living, and the issue of any deceased child by right of representation. If none of them are living, the fund is to be distributed as if he then had died intestate. The sixth clause further directs, that "All payments of income hereunder shall be made at least semi-annually and shall be made into the hands of each beneficiary or upon his or her order therefor signed at or immediately before the payment thereof, without power of anticipation by voluntary or involuntary assignment or otherwise and free from the interference or control of any creditor."

By the first question the executors ask for instructions as to "What interests passing to the children of the testator under said will are presently taxable?" The interest of the children in the gifts of income for the first ten years, which by her death includes that portion provided for the widow, having vested in possession is subject to the inheritance tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1, in force when the testator died. *Attorney General v. Stone*, 209 Mass. 186. *State Street Trust Co. v. Treasurer & Receiver General*, 209 Mass. 373. The petition, although brought under St. 1909, c. 490, Part IV, § 21, contains no claim for abatement for which provision is made in § 20, and which may be enforced in equity in the court of probate. *Attorney General v. Roche*, 219 Mass. 601, 602. And, having been duly certified by the Tax Commissioner, those taxes are payable by the executors in performance of their duty as required by statute.

The second and third questions are, "Whether your petitioners are entitled to have the tax upon the entire estate certified and determined," and "Whether your petitioners are entitled to a

settlement of the tax upon the basis of the present value of the estate and a rate determined by having all elements which create uncertainty in respect to the value of each interest and consequently as to the rate of taxation thereon and render it impossible to compute, considered in the light most unfavorable to them." But as § 4 provides, that "In all cases where there shall be a grant, devise, descent, or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the person or persons so entitled thereto, at the expiration of one year after the date when the right of possession accrues to the person or persons so entitled," the executors who have performed their present duties are not entitled to instructions as to what their duties may be upon the happening of future events with which they may have no official connection. *Peabody v. Tyszkiewicz*, 191 Mass. 317, 322. It is to be assumed that before the expiration of the period of ten years they will close the estate and transfer the property to the trustees by whom the trust is to be administered, and the succession taxes which accrue in the future "whether imposed upon principal or income . . . paid out of the principal of the residue of my estate" as directed by the testator. *Daggett v. White*, 128 Mass. 398. *Welch v. Boston*, 211 Mass. 178, 181.

The petitioner and co-executor George W. Mitton, a beneficiary of income and one of the remaindermen, also asks whether he "is entitled to have the tax upon his future interest determined and certified if he is willing to waive the right to a possible diminution in the value of his interest by the birth of additional issue." By § 6, "Except as hereinafter provided, said tax shall be assessed upon the actual value of the property at the time of the death of the decedent. In every case where there shall be a devise, descent, bequest or grant to take effect in possession or enjoyment after the expiration of one or more life estates or a term of years, the tax shall be assessed on the actual value of the property or the interest of the beneficiary therein at the time when he became entitled to the same in possession or enjoyment. The value of an annuity or a life interest in any such property,

or any interest therein less than an absolute interest, shall be determined by the 'Actuaries' Combined Experience Tables' at four percent compound interest."

But the petitioner cannot come into possession of the remainder until the termination of the limited life estates, which are to run for nearly a generation. It is then that the tax is to be assessed and payment made from the trust fund by the trustee then in office, and as this event has not happened he must resort to § 7, which reads as follows: "Any person or persons entitled to a future interest or to future interests in any property may pay the tax on account of the same at any time before such tax would be due in accordance with the provisions hereinbefore contained, and in such case the tax shall be assessed upon the actual value of the interest at the time of the payment of the tax, and such value shall be determined by the Tax Commissioner as hereinafter provided. In every case in which it is impossible to compute the present value of the future interest the Tax Commissioner may, with the approval of the Attorney General, effect such settlement of the tax as he shall deem to be for the best interests of the Commonwealth, and payment of the sum so agreed upon shall be a full satisfaction of such tax." The right conferred is for the benefit of those who are liable in the future for an inheritance tax, and, if the present value can be computed, a devisee or legatee is given the right to have his interest in an estate in expectancy presently taxed instead of being postponed until he comes into possession when § 6 governs. If an estate in remainder is appraised simultaneously with an annuity or life interest, its value is determined by deducting from the entire estate the value of the annuity or life estate. *Dow v. Abbott*, 197 Mass. 283, 288. *Howe v. Howe*, 179 Mass. 546, 550.

If the beneficiary's particular estate is not for life but is limited to a less period, nevertheless it is an "interest therein less than an absolute interest," and no sufficient reason is shown why ordinarily valuation cannot be based on its probable duration calculated in accordance with the tables. It is an interest which takes "effect in possession or . . . actual enjoyment after the expiration" of one or more intermediate estates. The trust, however, as we have said, runs for a period of twenty-five years, for the first ten years of which the principal is to be increased by

the accumulation of undistributed income. The character of the property to be turned over by the executors to the trustees is such that the amount, if any, which may be accumulated cannot be presently and exactly fixed, and under the scheme of the will any accumulation constitutes a future interest which can be ascertained only when the time for distribution comes. But this is not the only element of positive uncertainty. The fund which includes all accumulations is to be "paid over in equal shares to my children then living, and the issue of any one or more of them deceased, by right of representation." The testator left at his death five children, three of whom including the petitioner had children then living, and all the children and grandchildren also were living when the petition was brought. It is plain from the wording of the will that not only the petitioner's issue, if he did not survive, and if he left no issue, his surviving brothers and sisters, or, if they or either of them were not living, their respective surviving issue if any, would take his share, but, if any of his brothers or sisters predeceased him leaving no issue, and he survived, his share of the fund would be increased accordingly. *Denny v. Kettell*, 135 Mass. 138. *Gibbens v. Gibbens*, 140 Mass. 102, 104, 105. *Stanwood v. Stanwood*, 179 Mass. 223, 226. *Cushman v. Arnold*, 185 Mass. 165, 168. *Alexander v. McPeck*, 189 Mass. 34. *Clarke v. Fay*, 205 Mass. 228. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35. It thus appears that the Tax Commissioner before he could compute "the actual value of the interest at the time of the payment of the tax" had to determine, not only the present worth of a future fund, the entire amount of which is absolutely uncertain, but whether the petitioner probably would come into possession of the designated share of that fund as provided in the will. What has been said concerning principal applies as well to the increased income expectant upon the completion of the period of ten years, leaving fifteen years more during which the trust is to continue. The uncertainty, if less in degree, is of the same type. The basis of computation whether the expectant estate consists of principal, or of income, must be determined soundly before a result can be reached which, while just to the petitioner, also properly protects the interests of the public in the raising of revenue where the amount to be derived is of the utmost importance. The computations of the actuary appearing

in the record treat "the value of the interests of the respective legatees, taking the interest of each child of the testator and his issue as a unit," on an assumption of the present value of the estate, which because of the uncertainty of the amount of the accumulation as well as the probable increase of the property over the value shown at the testator's death, the commissioner well might deem as nothing more than an approximation, which he could not safely adopt and follow. The question before him as a public officer whose duties are prescribed by law was a question of fact concerning taxation over which the statute gives him jurisdiction. If he errs in matters of law the error may be corrected, and his decision, that the present value of the petitioner's interest could not be computed, is not shown to have been erroneous. *St. 1909, c. 490, Part IV, § 20. Gibbs v. County Commissioners*, 19 Pick. 298, 299. *Sears v. Nahant*, 208 Mass. 208. *Attorney General v. Roche*, 219 Mass. 601.

The statute, however, further provides that the commissioner, if "it is impossible to compute the present value, . . . may, with the approval of the Attorney General, effect such settlement of the tax as he shall deem to be for the best interests of the Commonwealth." But from the very language of the statute whether such action shall be taken rests in his sound discretion and judgment, and his refusal to comply with the request or demand of the petitioner that a settlement be effected is not reviewable. *French v. Jones*, 191 Mass. 522, 532, and cases cited. The decree of the Probate Court dismissing the petition should be affirmed.

Ordered accordingly.

FREDERICK M. ELLIS vs. MEMBERS OF CIVIL SERVICE
COMMISSION.

Suffolk. December 7, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Police. Civil Service. Cambridge.

After the acceptance by a city of St. 1911, c. 468, every member of the police department of that city is subject to the civil service laws and the rules made

thereunder whether he is the head of the police department or an ordinary patrolman.

The adoption by the city of Cambridge of the Plan B form of city government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of the city subject to the civil service laws.

PETITION, filed on September 29, 1917, for a writ of mandamus addressed to the members of the civil service commission commanding them to authorize the petitioner's appointment as the head of the police department of the city of Cambridge and the payment to him of the salary therefor, and to recognize the petitioner's appointment to that office as being legal and not in violation of the civil service laws and the rules made thereunder.

The case was heard by *Crosby, J.* The petitioner asked the single justice to make the following rulings:

"1. Upon all the evidence and agreed facts the petitioner is entitled to a writ of mandamus as prayed for in his petition.

"2. By virtue of an ordinance of the city of Cambridge, a copy of which ordinance is annexed to the petitioner's petition, creating departments of police and fire in said city, the police department of said city is a principal department of said city and the head of said department designated in said ordinance as 'chief of police department,' is not affected as to his selection or appointment by R. L. c. 19, and acts in amendment thereof and in addition thereto or by any rule or rules made thereunder by the civil service commission.

"3. Upon all the evidence and agreed facts the police department of the city of Cambridge is a department of said city and under and by virtue of St. 1915, c. 267, Part III, § 5, the head of such department is appointed by the mayor of said city and such appointee is subject to confirmation by the city council of said city and, therefore, is not affected as to his selection or appointment by R. L. c. 19, and acts in amendment thereof and in addition thereto or by any rule or rules made thereunder by the civil service commission.

"4. Upon all the evidence and agreed facts the petitioner, appointed by the mayor of the city of Cambridge to the office of chief of the police department of the said city, is an officer of the city within the meaning of R. L. c. 19, § 9, and acts in amendment thereof and in addition thereto whose appoint-

ment under and by virtue of the ordinance of said city, a copy of which ordinance is annexed to the petitioner's petition, is subject to confirmation by the said city council, and, therefore, is not affected as to his selection and appointment by said R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission.

"5. The legal effect of St. 1911, c. 468, being 'An Act to extend the provisions of the civil service act to chiefs of police of certain cities and towns' is to bring the office of chief of police in such cities and towns as have accepted said act under the operation of the civil service laws and the rules made thereunder by the civil service commission to the same degree, effect and extent only, as respects said office, as though said office had not been excepted from the operation of R. L. c. 19, but had been included therein.

"6. The appointment of your petitioner as head of the police department of the city of Cambridge is the appointment of the head of a principal department of said city within the meaning of R. L. c. 19, § 9.

"7. The appointment of your petitioner as head of the police department of the city of Cambridge is the appointment of an officer of said city within the meaning of R. L. c. 19, § 9.

"8. If prior to the enactment of St. 1915, c. 267, the head of a police department of a city, whose appointment, subject to confirmation by the city council of said city, was within the provisions of R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission, the acceptance and adoption by such city of St. 1915, c. 267, Part III, withdrew said office from the operation of the provisions of R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission."

The single justice was "of opinion and ruled that by R. L. c. 19, § 9, as amended by St. 1911, c. 468, § 1, the office of chief of a police department is subject to the civil service rules. *Attorney General v. Tillinghast*, 203 Mass. 539. *Lattime v. Hunt*, 196 Mass. 261. The effect of St. 1911, c. 468, construed in connection with R. L. c. 19, § 9, is to place chiefs of police under civil service the same as other members of the police department, regardless of any exceptions made under R. L. c. 19, § 9. Although generally

under R. L. c. 19, § 9, heads of departments are exempted from civil service, still chiefs of police by St. 1911, c. 468, § 1, are expressly made subject thereto. The fact that the appointment of a chief of police must be confirmed by the city council does not exempt the office from the civil service rules, because by the express terms of St. 1911, c. 468, § 1, such office is subject to the rules of the civil service."

The justice ruled that the petition could not be maintained, and accordingly refused to make the rulings requested by the petitioner "because unsound in law or immaterial in view of the foregoing rulings." He made an order that the petition for a writ of mandamus be denied; and the petitioner alleged exceptions.

H. F. R. Dolan, for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the respondents.

PIERCE, J. This is a petition for a writ of mandamus, brought in the Supreme Judicial Court for the county of Suffolk under R. L. c. 19, § 34, as amended by St. 1910, c. 359, to compel the respondents, as they are civil service commissioners for the Commonwealth, to authorize the appointment of the petitioner as head of the police department of the city of Cambridge and the payment of compensation therefor, and to recognize the appointment of the petitioner to said office as legal and not in violation of the civil service laws or any rule or rules made thereunder.

The first contention of the petitioner is that police commissioners, chiefs, marshals, and chiefs of police departments, by the terms of the act are exempt from civil service rules by express enumeration if not otherwise excluded by reason of their election to office by the people, by a city council or by an appointment which is subject to confirmation by the executive council or city council of any city.

An examination of the St. of 1884, c. 320, § 15, and a comparison of the order of its clauses with their arrangement as reenacted in R. L. c. 19, § 9, make it plain that the Legislature intended that the civil service rules should apply to all members of the police department below the rank of commissioner, superintendent, marshal, or chief, regardless of the manner of their election, appointment and confirmation. It also is manifest that the heads of the police departments, whatever be their title,

were excepted from the civil service laws and rules which applied to all other members of the police department by the statutory limitation and definition of the words "members of" as used in the act, and not by reason of the dignity and title of any office or of the manner of election or induction to office. The effect of the acceptance of St. 1911, c. 468, by the city of Cambridge upon St. 1884, c. 320, § 15, R. L. c. 19, § 9, was that the statute thereafter read (as if originally enacted without limitation or restriction), "such rules shall apply to members of police and fire departments." So read the terms of the act make every member of the police department subject to the laws and rules of the civil service whether he be the head of the police department (a principal department) or an ordinary patrolman.

It is further contended that the St. of 1911, c. 468, so far as concerned the city of Cambridge, was repealed by implication by the adoption of a new charter, Plan B under St. 1915, c. 267, which among other provisions provides in Part III, § 6, relative to the removal of heads of departments and officers of municipal boards, as follows:

"The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board before the expiration of his term of office, except members of the school committee, officials appointed by the Governor, and assessors where they are elected by vote of the people. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing."

At the time of the adoption of the charter there was a department of the city known as the department of public safety, established under St. 1912, c. 611, and this department was a consolidation of the police and fire departments existing at the date of the passage of St. 1912, c. 611. On May 22, 1917, the city council duly passed an ordinance approved by the mayor abolishing the department of public safety and establishing a fire department and police department. It provides:

"Section 4. The police department shall be under the charge of a chief of police department who shall be the head of said department.

"Section 5. The said head of said departments shall be appointed by the mayor, subject to confirmation by the city council, for an indefinite period and the mayor may, at any time, with the approval of the city council, remove said heads of said departments or either of them, in accordance with the provisions of the city charter."

The St. of 1911, c. 468, was not expressly repealed by St. 1915, c. 267, and its provisions relating to the appointments and removals are not so inconsistent or unworkable as to involve either a surrender of granted municipal powers or an abatement or modification of any essential provision of St. 1904, c. 314, and St. 1906, c. 210.

In the matter of appointments the authority of the mayor is limited only in that his selection of the appointee must be made from a list of competent persons certified to him by the civil service commission. In the matter of removals under the civil service rules, formal charges must be preferred and an opportunity given for a public hearing. *Tucker v. Boston*, 223 Mass. 478. Under the charter the person removed "shall receive a copy of the reasons for his removal" and has a right to a hearing thereon, and by counsel to contest the same, before the city council. Before removal, under the civil service law or under the charter, the person sought to be removed shall receive a copy of the reasons for his removal, and shall, if he desires, be given a hearing before the city council. St. 1904, c. 314. St. 1915, c. 267, Part III, § 6.

The right of appeal to a District Court under St. 1911, c. 624, is not irreconcilable with the procedure of hearings upon charges before the city council sitting as a trial board under St. 1915, c. 267, Part III, § 6.

Exceptions overruled.

EVA CHARTIER, administratrix, vs. BARRE WOOL COMBING
COMPANY, LIMITED.

SAME vs. GARDNER ELECTRIC LIGHT COMPANY.

Worcester. October 2, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ. .

Negligence, Contributory. Electricity. Evidence, Matters of common knowledge.

It has become a matter of common knowledge that physical harm is likely to follow contact with a wire charged with an electric current and also that copper wires are used for the transmission of such a current.

Where before the enactment of St. 1914, c. 553, a painter, whose employer had agreed to paint a large iron smoke stack on the top of a power house, twice already had ascended a ladder placed against the stack, the foot of which, instead of being put on the roof of the power house where it might have been put perfectly well, had been placed on the small adjoining roof of a substation of an electric light company, which was surrounded by a parapet wall from eight to twelve inches high enclosing a space substantially occupied by copper wires uninsulated and carrying a high voltage of electricity, plainly open to view and sizzling and hissing, and where this painter, on returning from partaking of refreshments at a neighboring hotel, went on the roof of the electric light substation without rubbers or gloves and placed one hand on the ladder ready to ascend it for the third time, and received a shock of electricity that resulted in his death, it was *held*, that as matter of law he was not in the exercise of due care at the time of his injury, and that neither the proprietor of the power house and stack nor the electric light company maintaining the wires was liable for causing his injury or death.

TWO ACTIONS OF TORT by the administratrix of the estate of Augustine Chartier, late of Ware, the first against the Barre Wool Combing Company, Limited, a corporation having its principal place of business at Barre, and the second against the Gardner Electric Light Company, a corporation, for causing the conscious suffering and death of the plaintiff's intestate by a shock from an electric wire carrying sixty-six thousand volts of electricity received by him on March 11, 1914, and resulting in his death on March 16, 1914. Writs dated March 3, 1915.

In the Superior Court the cases were tried together before *Sanderson, J.* The evidence relating to the question whether the plaintiff's intestate was in the exercise of due care is described in the

opinion. At the close of the evidence, the defendants among other requests, asked the judge to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care and that the plaintiff could not recover. The judge refused to make this and other rulings requested by the defendants and submitted the cases to the jury.

The jury returned a verdict for the plaintiff in each of the cases in the sum of \$1,500 for conscious suffering and in the sum of \$2,500 for causing death, the verdict being the same against each of the defendants. After the return of the verdicts but before their recording the presiding judge under St. 1915, c. 185, reserved leave, with the assent of the jury, to enter a verdict in each case for the defendant if upon the exceptions taken or the questions of law reserved it should be decided that such verdicts for the defendants should have been entered. Each of the defendants alleged exceptions.

F. F. Dresser, (*G. P. Hughes* with him,) for the defendant in the first case.

C. C. Milton, (*F. L. Riley* with him,) for the defendant in the second case.

E. H. Vaughan & G. D. Storrs, for the plaintiff, submitted a brief.

PIERCE, J. At the time of the accident the intestate was in the employ of one Gauette as a painter. Gauette had entered into an agreement with the defendant in the first case, the Barre Wool Combing Company, Limited, to paint an iron smoke stack for a lump sum of money. He was to furnish men, all rigging, stock and material, — everything to go right on with the job except ladders, which that defendant had and agreed to lend.

The iron stack was about one hundred and four feet high and five feet in diameter, with a permanent iron ladder running from the top to a point thirty-four feet and six inches above the roof of a power house containing a steam turbine and boiler. The roof of this building was eighty-two feet by fifty-two feet and was clear and unobstructed. The stack stood separate and some feet distant from the side of the power house.

Adjoining the power house and two feet and four inches distant from the iron stack was a small building, which stood on land of the Barre Wool Combing Company, Limited, but was built,

owned, and controlled by the defendant in the second case, the Gardner Electric Light Company. This building was used by the last named defendant as a transformer station to furnish high voltage electric current delivered there by the Connecticut River Transmission Company from generating stations on the Connecticut and Deerfield rivers. The roof of the transforming station was higher than the roof of the power house. The coping of the substation at its northeast corner where it joined the power house was fifteen inches and the coping at its northwest corner where it adjoined the power house was three feet and two inches above the roof of the power house. The roof of the substation was a few inches below the coping at its east side and a foot and one half at its west side. It was twenty-seven and a half feet measured east and west and thirteen feet in width, and was entirely surrounded and enclosed by a parapet wall of brick with a small stone coping eight to twelve inches wide. Upon the roof of the substation and within the enclosure were nine standards about four feet in height above the roof occupying with the wires substantially all the space within the parapet. The base of them was concrete that went up perhaps half the height, and above were posts and bell shaped pieces — insulators — to which choke coils and power wires carrying a voltage of sixty-six thousand volts were attached. The posts of those nearest the smoke stack were about five feet from the edge of the substation roof, and the base of the concrete was about three and one half feet from the edge of the substation roof. The power wires were open to view, were not insulated and were “sizzling” before and at the time of the accident.

On the morning of the accident Gauette, the plaintiff's intestate and the other workman went with their tackle to the premises. Gauette selected of the ample supply of ladders such as he chose. He and his men put a thirty-foot extension ladder against the power house, went up from the ground to the roof, pulled it on top of the roof and then raised it against the stack. It did not reach to the foot of the iron ladder attached to the stack; then it was pulled down and they went to the substation building, stepped up on the coping, then on or over the wall or parapet and again placed the thirty-foot ladder against the stack. It was not long enough. “We lifted the thirty-foot ladder down from the

stack and down from the boiler roof on to the ground and we raised this thirty-five foot ladder we brought." There were other and longer ladders available, but no attempt was made to use or raise them from the power house. The ladder when placed rested on the substation roof, one leg a few inches distant and the other a little farther from one of the concrete posts to which the high voltage wires ran.

The intestate went up the ladder to the bottom of the iron ladder, lashed the wooden ladder to the iron ladder and then came down. He again climbed the ladder this time to the top, where he fastened his block. On coming down he appeared nervous and the three men went over to the hotel where the intestate partook of refreshments. On their return they went on the roof, the intestate without rubbers or gloves. He placed one hand on the ladder ready to go up and received an electric shock as he did so.

The accident happened before St. 1914, c. 553, and consequently the burden is on the plaintiff to prove at least the due care of the intestate. The photographs submitted at the hearing make it plain that the intestate knew or should have known the peril to life that hedged about his entrance to the roof of the substation. The copper wires were exposed to view, they were not insulated — they were unprotected; the roof space occupied was narrow and not devoted to other uses, and it was set apart and enclosed from neighboring property by a sizable parapet. It has become common knowledge that physical harm is likely to follow any contact with an electrical current, and it is equally well known that copper wires are used as the medium of the transmission of such a current. The sizzling and hissing of the wires were unmistakable and presented a warning of danger near at hand to be disregarded at one's peril. No exigency of time or of space called for the use of the substation roof as a place to rest the ladder. The roof of the power house was large and free of obstruction and there was an abundance of ladders ready for use. Knowing all the above facts, as the intestate must have done, neither he nor any one on his behalf took any precaution whatever for his safety. *French v. Sabin*, 202 Mass. 240, 242.

The sizzling wires, the restricted space within which they were confined, the obvious likelihood of harm to a person who should come near them, and the fact that the business of the intes-

tate did not necessitate going upon the dangerous roof distinguish the case at bar from *Griffin v. United Electric Light Co.* 164 Mass. 492, *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495, and *Prince v. Lowell Electric Light Corp.* 201 Mass. 276.

The motion to direct a verdict for each defendant should have been granted. It follows that there is no occasion to consider whether the plaintiff was upon the premises by the express or implied invitation of either defendant.

And it also follows that judgment in each case must be entered for the defendant. St. 1909, c. 236.

So ordered.

COMMONWEALTH vs. JOHN F. KENNEY.

Essex. November 7, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Bastardy Proceedings, Dismissal by agreement, Intervention by overseers of the poor.

After a bastardy proceeding under R. L. c. 82, begun on complaint of the mother, has been dismissed by agreement of the complainant and the putative father, it is too late for the overseers of the poor of the municipality wherein the mother has a settlement to intervene to prosecute the complaint.

St. 1913, c. 563, relative to illegitimate children and their maintenance, does not apply to a motion and application by the overseers of the poor of the municipality wherein the mother of such a child has a settlement to be permitted to intervene to prosecute a bastardy proceeding under R. L. c. 82, begun in January, 1913, on complaint of the mother relative to a child born in 1912 and dismissed on July 18, 1913, by agreement of the mother and the putative father, because by § 9 of the statute it does not affect proceedings begun before July 1, 1913.

The rights given to a municipality by R. L. c. 82, § 18, which provides that no settlement made by the father and mother of an illegitimate child shall relieve the father from liability to any city or town or the Commonwealth for the support of the child, cannot be enforced by permitting the overseers of the poor to intervene to prosecute a proceeding, begun under that chapter on complaint of the mother, after that proceeding has been dismissed by agreement of the mother and the putative father.

COMPLAINT, received and sworn to on January 28, 1913, in the Central District Court of Northern Essex under R. L. c. 82, alleg-

ing that the defendant was the father of the illegitimate child of the complainant, Etta G. DeCourcy.

On July 18, 1913, there was filed an agreement of the complainant and the defendant that the entry be made, "Complaint dismissed." On the same day the clerk of the court made the entry on the docket, "Dismissed as on file."

On February 23, 1917, the overseers of the poor of the city of Newburyport filed a motion to be allowed to intervene to prosecute the complaint. The motion was heard by *Quinn, J.* The material facts are stated in the opinion. The judge denied the motion, and the overseers of the poor alleged exceptions.

H. I. Bartlett, for the overseers of the poor.

G. H. McDermott, (*P. J. Nelligan* with him,) for the defendant.

CARROLL, J. This is a motion by the overseers of the poor of Newburyport to be allowed to intervene and prosecute a bastardy complaint brought by the mother against the defendant, under R. L. c. 82.

At the hearing the overseers of the poor offered to show that the complaint was entered in the Superior Court on the first Monday of March, 1913, that on July 18, 1913, the complainant, who had a settlement in Newburyport, signed an agreement to dismiss the case which was filed on the same day, and the clerk made the entry on the docket, "July 18, dismissed as on file." The child was born April 27, 1912. The defendant paid the board of the child "most of the time from sometime in June, 1912, to sometime in February, 1915." The complainant received nothing from the defendant, except his promise to pay for the child's board. In April, 1915, the defendant was brought before the "District Court in Haverhill on a complaint under St. 1913, c. 563." The case was dismissed "because of the bastardy complaint." Thereafter application was made to the overseers of the poor of Newburyport for assistance in the support of the child. They then learned for the first time that there was such a child and of the proceedings that had been had. They paid \$2.50 per week from June 10, 1915, and still are paying at that rate for the child's support.

The judge denied the motion to intervene to prosecute and refused to admit the application of the overseers to prosecute the case, to which ruling they excepted.

The original complaint was brought under R. L. c. 82, providing for the maintenance of bastard children. St. 1913, c. 563, relative to illegitimate children and their maintenance, which took effect July 1, 1913, does not apply to the motion and application of the overseers in the proceedings before us, as § 9 of that statute providing for the repeal of c. 82 declares that this repeal does not affect proceedings begun before the first of July in the year 1913.

If a woman entitled to make a complaint under the bastardy act, refused or neglected to do so, the overseers of the poor where she had her settlement could make a complaint and prosecute it. R. L. c. 82, § 2. If the overseers of the poor had intervened, no complaint instituted by the mother could have been withdrawn, dismissed or settled by agreement between her and the putative father, without the consent of the overseers, unless provision was made "to the satisfaction of the court, to relieve and indemnify any parent, guardian, city, town or the Commonwealth from all charges which have accrued or may accrue for the maintenance of the child." R. L. c. 82, § 17. If this had been done the case could not have been settled except under § 17; but the overseers of the poor did not intervene until after the case was dismissed by the parties and final judgment entered. There is no provision of law which gives to the overseers of the poor the right to intervene under these circumstances. See *Haley v. Whalen*, 121 Mass. 533.

R. L. c. 82, § 18, provides, "No settlement made by the father and mother, before or after the complaint is made, shall relieve the father from liability to any city or town or the Commonwealth for the support of a bastard child." The rights, however, given under this section against the father for the support of the child, cannot be enforced by intervening in the bastardy case, after that case has been finally dismissed by the agreement of the complainant and the defendant, who were the only parties to the record.

Exceptions overruled.

REBECCA DAVID *vs.* JAMES E. LENNON.

Middlesex. November 7, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Poor Debtor. Officer. Notice.

Where a judgment creditor lives on the ground floor of a three apartment house, if a notice by the judgment debtor, who had been arrested in poor debtor proceedings and had recognized with surety, that he desired to take the oath for the relief of poor debtors, was placed by a constable upon a large unused ice chest belonging to the judgment creditor in the common hall on the ground floor, which had, besides the front door, three doors leading from it, two to the creditor's apartments and one to the common water closet, and from which a common stairway led to the second floor, such notice was not served upon the creditor by leaving it at his last and usual place of abode and does not satisfy the requirements of R. L. c. 168, § 34.

TORT against a constable of the city of Cambridge for a false return upon a notice of desire by a judgment debtor, one Louis Fuhrman, to take the oath for the relief of poor debtors. Writ dated May 2, 1912.

In the Superior Court the action was heard by *Brown, J.*, without a jury. The plaintiff was the judgment creditor, who obtained his judgment against Fuhrman on December 3, 1910, for \$2,000 debt or damages and \$52.28 costs. Other material facts and the terms of the report by the trial judge are set forth in the opinion.

The case was submitted on briefs.

J. J. Foley, for the defendant.

H. T. Richardson & B. H. Greenhood, for the plaintiff.

CARROLL, J. The defendant is a constable of the city of Cambridge. This action is for a false return of service on a notice to take the oath for the relief of poor debtors. The plaintiff recovered judgment against Louis Fuhrman, execution issued against him, he was arrested and recognized with surety. On March 22, 1911, he applied to take the oath for the relief of poor debtors and a notice was issued to the plaintiff, returnable April 7, 1911. The defendant made return that he had served the notice on the creditor (the plaintiff in this action), on April 4, 1911, "at

8 o'clock and 5 minutes P. M., . . . by leaving an attested copy at the last and usual place of abode." On April 7, 1911, the creditor did not appear and the oath for relief was given.

The plaintiff lived on the ground floor of a three apartment house. The common hall on the ground floor had, besides the front door, three doors leading from it, two to the plaintiff's apartment and "one to the common water closet." There was a common stairway leading from this hall to the second floor. On the night of April 4 this hallway was not lighted, the defendant "could see nothing, and had no means for striking a light." He rapped at the door, and receiving no response, tried to put the notice under the door. Being unable to do so, he found a large unused ice chest belonging to the plaintiff, which the defendant supposed was a table, and placed on it a copy of the notice in a sealed envelope. The plaintiff never received the copy of the notice and knew nothing about it until after the oath was administered to Fuhrman.

The trial judge found and ruled that the service of the notice was not made at the last and usual place of abode of the plaintiff and found for her in the sum of \$2,830.94. The case was reported solely on the question "Whether my finding and ruling relative to the service, as above set forth, was correct."

When a debtor is arrested and taken before a magistrate, if he desires to take the oath for relief of poor debtors, an attested copy of the notice of the time and place fixed for the examination, must be served on the creditor by giving such copy to the creditor or his agent, or attorney, or by leaving such copy at the last and usual place of abode "of the plaintiff or creditor, or his agent or attorney." R. L. c. 168, §§ 33, 34. It was said in *Slasson v. Brown*, 20 Pick. 436, 440, "It is essential to the rights of parties that they should have proper notice of all proceedings affecting their interests. This principle lies at the foundation of all our proceedings in courts of justice." There was no personal service in the case at bar and the copy of the notice was not served at the last and usual place of abode of the creditor. It was left in the common hallway which was occupied by other tenants of the apartment block, and where the creditor did not have the right of exclusive possession. "The mere fact that the summons is left under the same roof where a person lives, does not make it a service at

his last and usual place of abode. . . . To make such a service valid, it must be left in the part of the house which the defendant inhabits and frequents; or it is not duly served upon him, as being left at his last and usual place of abode." *Fitzgerald v. Salentine*, 10 Met. 436, 438.

It follows that according to the terms of the report, judgment is to be entered for the plaintiff on the finding.

So ordered.

SARA S. MACGILL-ALLEN vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Suffolk. November 9, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Railroad. Evidence, Competency, Materiality.

At the trial of an action against a railroad corporation for personal injuries received by a passenger when, as she was leaving a car on a train of the defendant at a station, the door of the car closed upon her hand, it appeared that in approaching the station the train ran on a straight track with a down grade of not more than three per cent, that the car was crowded and passengers were standing in the aisle near the door through which the plaintiff was to pass, and that as the plaintiff left the car she followed others. There was no evidence that there was a catch to hold the door in place when open nor of any defect in the door or its appliances, nor was there any evidence to show by whom the door was opened. *Held*, that there was no evidence warranting a finding of negligence of the defendant.

At the trial above described, a question, asked by the plaintiff in cross-examination of the conductor of the train, as to how many brakemen the law required a railroad to have on the platform of its trains, properly was excluded.

It also was proper to exclude at the same trial, where there was no evidence to show that the brakeman opened the door, a question asked the same conductor as to whether the brakeman "was . . . in the habit of fastening the door back, opening the door."

TORT for personal injuries received by the plaintiff when, as she was leaving a train of the defendant, her hand was crushed by the door closing upon it. Writ dated August 30, 1913.

In the Superior Court the case was tried before *Lawton, J.* The material evidence is described in the opinion.

The questions referred to in the last paragraph of the opinion were asked by the plaintiff in cross-examination of the conductor of the train upon which the accident happened, and were as follows:

"You have stated you are familiar with the law. What is the law in regard to the brakeman on a five-car train? How many brakemen does the law require a road, railroad, — New York, New Haven & Hartford, or any road within the Commonwealth of Massachusetts, — to have on the platforms of its trains?"

"Was he (the brakeman) in the habit of fastening the door back, opening the door?"

The judge excluded both of these questions.

At the close of the evidence the judge ordered a verdict for the defendant, and the plaintiff alleged exceptions.

M. W. Cottle, for the plaintiff.

Joseph Wentworth, for the defendant.

CARROLL, J. The plaintiff was a passenger on one of the defendant's trains. She boarded the train at Atlantic, and at South Boston where the train stopped, when about to alight, her left hand was caught in the jamb of the forward door of the car in which she was travelling. At this station the track is straight, the grade as estimated by an engineer called by the plaintiff was about two and one half to three per cent down grade toward Boston. The car upon which the plaintiff was travelling was crowded, people were standing in the aisle near the forward door through which the plaintiff passed. She followed the passengers leaving the car and stepped on the platform for a moment to allow some people to precede her. As she was going upon the platform of the car, she saw the brakeman approaching "through the aisle of the forward coach, and heard him shout, 'Look out for your hand;' that the warning came too late, for the door fell to, crushing the fingers of her hand." There was evidence from one witness that "as each passenger went out, they held the door. . . . I saw three or four men go out ahead of her." There was nothing to show that there was a catch to hold the door in place when open, and there was no evidence of any defect in the door or its appliances; although there was evidence tending to show that passengers held the door open as they left the car, nothing appeared to show by whom or at what time the door was opened.

We are unable to distinguish this case from *Casey v. New York, New Haven, & Hartford Railroad*, 207 Mass. 443, *Hunt v. Boston Elevated Railway*, 201 Mass. 182, *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254, where it was held that the falling of a window or the closing of a door, without evidence of a defect or some evidence of negligence of the company's servants, is not enough to warrant the submission of the case to the jury. The plaintiff contends that the case at bar differs from *Casey v. New York, New Haven, & Hartford Railroad*, *supra*, because in that case there was no evidence of a down grade when the train stopped, and further, that in the case at bar there was nothing to show that the door was opened by a passenger. In the *Casey* case there was some evidence that the door was opened by a companion of the plaintiff, but this fact does not distinguish the case from the one before us. The door may have been opened by a passenger or by someone else; but the difficulty with the plaintiff's case is that there was nothing to show by whom the door was opened. In *Hunt v. Boston Elevated Railway*, *supra*, the plaintiff was injured while a car was rounding a curve, by the door coming out of the socket and striking her hand. It did not appear in that case by whom the door was freed from the catch. In *Faulkner v. Boston & Maine Railroad*, *supra*, there was no evidence that the window was raised by the defendant's employees. A grade of two and one half to three per cent does not show negligence; nor did this fact require the presence of a brakeman at the door of each car where passengers were alighting, and his absence from the platform was not negligence. In *Kellogg v. Boston & Maine Railroad*, 210 Mass. 324, *Silva v. Boston & Maine Railroad*, 204 Mass. 63, the car door was opened by employees of the defendant and for this reason these cases are not applicable to the case at bar.

The questions put to the conductor as to the number of brakemen required by law on a five car train, and whether the brakeman "was . . . in the habit of fastening the door back, opening the door" were excluded properly.

Exceptions overruled.

PATRICK J. O'TOOLE'S (dependent's) CASE.

Suffolk. November 9, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act.

Where a city, that had accepted St. 1913, c. 807, hired for work on its highways a steam roller at \$15 a day, its owner furnishing the "engineer, coal, wood and steam" and the city employees at different times helping the engineer to roll up the curtains, put coal in the bunkers and fill the tank, and a workman employed by the city to spread cracked stone on the roads, who once had helped the engineer of the steam roller to roll up the curtains and had ridden with him on the steam roller and had asked him to teach him how to run it and on two occasions had operated the roller a short distance, one day when the men had stopped work between twelve and one o'clock was called by the engineer to the roller, which was at rest, where the two men engaged in conversation that "had nothing to do with the work," when the engineer started the machine "to blow off some steam" and soon the roller began to coast down a hill and got beyond the control of the engineer and, crossing a sidewalk, crushed the employee of the city between the piazza of a house and the wheels of the roller so that he died as the result of his injuries, his dependent widow is not entitled to claim compensation under the workmen's compensation act, because the injuries that caused the death of the employee did not arise out of or in the course of his employment.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation upon the claim, as a dependent, of Bridget O'Toole, the widow of Patrick J. O'Toole, late of Boston, who was injured when in the employ of the city of Boston on August 4, 1915, and died as the result of the injury, the claim being made under St. 1913, c. 807, accepted by the city of Boston.

The case was heard by *Jenney, J.* The evidence reported is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, awarding to Bridget O'Toole as the dependent widow of Patrick J. O'Toole \$10 a week for a period of four hundred weeks from August 4, 1915. The city of Boston appealed.

W. J. O'Malley, for the city of Boston.

D. J. Reardon, (*M. T. Hart* with him,) for the dependent widow.

CARROLL, J. There was evidence that the city of Boston hired a steam roller at \$15 a day for work on its highways, the contractor who owned it furnishing "engineer, coal, wood and steam." The employees of the city at different times helped the engineer, Gilbert Peloquin, roll up the curtains, put coal in the bunkers and fill the tank. Patrick J. O'Toole was employed by the city, in spreading cracked stone on the roads. The engineer testified that the only time this employee helped him around the roller was when he helped to roll up the curtains, though the employee "had ridden with him before on the steam roller and had asked him to teach him [the employee] how to run it." On two occasions before the accident O'Toole operated the roller a short distance, while being taught. At another time he rode on the roller. On the day of the accident the men stopped work between twelve and one o'clock. It was raining very hard and while the roller was at rest the engineer called O'Toole, saying, "Come here, Pat, I want to speak to you." They engaged in conversation. The "conversation was just social and had nothing to do with the work," O'Toole speaking of a transfer to another department. They "spoke a few words." O'Toole said he was getting wet and stepped on the roller. The engineer started the machine "to blow off some steam." After going up and down the street, he stopped on top of the hill. The roller started to coast down the hill and when the engineer took hold of the throttle, the "gears came up; the pin which holds the gears had come out . . . the machine crossed over the sidewalk." O'Toole was caught between the piazza of the house and the wheels of the roller. This was about "ten minutes to one or twenty minutes to one." He died as a result of these injuries.

These controlling facts show that, while O'Toole was on the roller, he was speaking to the man in charge about his own affairs and his presence there related solely to his own interests. His occupation did not require him to be there. He was there discussing his own prospects and his transfer to another department, or matters "just social and had nothing to do with the work." He was not called by the engineer to perform any work or to aid in any way in carrying on the business of the employer. The testimony, that Peloquin said after the injury that O'Toole was his helper, does not contradict these essential facts; indeed, there

was no evidence to contradict them or to show that when injured the employee was occupied in the work for which he was hired and in which the city was engaged. It follows from this that the injury to the employee did not result from his employment and did not arise out of or in the course of it, and there can be no recovery. *Savage's Case*, 222 Mass. 205, and cases cited.

There are cases which hold that an employee is protected by the workmen's compensation act, although not at the time actually engaged in the work for which he was hired. If the employee is injured in going to or returning from his work upon the master's premises, or on premises available for the purpose, or if during intervals of leisure which occur in the course of his employment he is injured, he may still be within the scope of his employment and entitled to the benefits of the act. *Sundine's Case*, 218 Mass. 1. *Blovelt v. Sawyer*, 6 W. C. C. 16. But the principle of these cases is not applicable where the servant leaves the sphere of his employment for some purpose of his own entirely disconnected with and not in any way incidental to the employment.

The decree is to be reversed.

Decree to be entered for the employer.

**MERTON H. WHEELOCK vs. CONSTANTENOS ZEVITAS & another
& trustees.**

Suffolk. November 12, 1917. — January 5, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Agent's duty of fidelity. *Practice*, Civil, Parties, Election between counts, Exceptions, Waiver. *Partnership*. *Broker*, Commission. *Contract*, Implied. *Waiver*.

The mere fact, that two persons held themselves out as partners doing business as real estate brokers and could be considered such by their creditors, is not a bar to an action brought by one only of them for a commission as broker, if it does not also appear that by agreement between themselves they were partners.

Where the evidence as to such an agreement is conflicting, the question of its existence is for the jury.

Where, at the trial of an action upon an account annexed for commissions alleged to have been earned by the plaintiff as a real estate broker, there is evidence

tending to show that the plaintiff as a broker contracted with the defendant to procure for him for certain commissions a lease to him of certain buildings and tenants who should sublet from the defendant, that the leases and tenants were obtained, that the plaintiff performed his part of the contract and that the defendant refused to pay him, the question of the defendant's liability is for the jury.

At the trial of an action upon a *quantum meruit* for the value of services as a real estate broker alleged to have been rendered by the plaintiff to the defendant, there was evidence tending to show that the plaintiff agreed to secure for the defendant a lease of certain buildings for which he was to receive a certain commission, but that he was not to receive his commission until the premises were rented for as much as or more than the defendant paid for his lease, that the plaintiff was to assist in placing subleases for the defendant without compensation, that the plaintiff performed his part of the agreement, and that, if he had been let alone in the management of the property and had had a little co-operation from the defendant, the property would have been sublet for a sum in excess of that paid by the defendant, but that the defendant, by his lack of diligence and failure to aid the plaintiff, prevented the property from making such return. *Held*, that the plaintiff had a right to go to the jury on the question whether he should recover the value of his services.

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker, and there is evidence tending to show that the services described in the first count were rendered, and also evidence that such services were not to be paid for until the real estate in question made a certain return to the defendant, which it had not done, but that the failure of such a return was due to lack of diligence and failure of the defendant to aid the plaintiff in bringing about such a return, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them.

If, at the trial of an action by a real estate broker for his commission, there is evidence tending to show that the plaintiff did not disclose to the defendant a material fact which he learned while acting in the course of his duties as the defendant's broker, the defendant in order to rely on the defence of want of fidelity of the plaintiff must call the attention of the trial judge specifically to such a contention either by a request for a ruling or in some other way; and, if he does not do so, he cannot raise the contention for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover.

In this case it was *said* that the information which the plaintiff did not communicate to the defendant did not appear to have been in regard to a fact of material importance to the defendant.

CONTRACT, with a declaration as amended in two counts, the first count being upon an account annexed containing six items, amounting in all to \$2,370.21 for commissions "on lease 33, 35, 37 Tremont St., Boston, from Arthur L. Braus to" the defendants, for "commission on lease of store and basement, 35 Tremont St., from" the defendants to William Sheinwald, for "commission

on lease 3d floor, 37 Tremont St.," from the defendants to "Imperial Photographic Studio, Inc.," and for interest. The second count was upon a *quantum meruit* for \$2,500 for services rendered to the defendants "in connection with leasing and subleasing the estate known as 33, 35 and 37 Tremont Street, Boston, during the years 1911, 1912, 1913 and 1914." Writ dated July 31, 1914.

In the Superior Court the action was tried before *Chase, J.*

One contention of the defendants was that, if they were indebted to the plaintiff, they were indebted to him jointly with one William V. Fischel, who was living and should have been joined as a plaintiff in the action. The evidence on this issue was conflicting. At the close of the evidence the defendants moved that a verdict be ordered for them. The motion was denied, and a special question was submitted to the jury, "Were the plaintiff and Fischel partners?" The jury answered the question in the negative.

The defendants received a sublease of the premises in question from Braus at a yearly rental of \$18,500, they paying the taxes.

Other evidence on the other issues involved is described in the opinion, where also are set out other contentions and requests of the defendants for rulings. A further special question, "Was the payment of a commission to the plaintiff upon the Braus lease dependent upon a condition which had not been performed prior to July 31, 1914, [the date of the writ]?" was submitted to the jury, and was answered in the negative.

The jury found for the plaintiff in the sum of \$2,370.21; and the defendants alleged exceptions.

J. H. Casey, (F. J. Muldoon with him,) for the defendants.

J. M. Hoy, for the plaintiff.

CARROLL, J. The plaintiff seeks to recover for services performed in obtaining a lease of a certain building for the defendants and in securing tenants for the same. The declaration is in two counts, the first on the account annexed and the second upon a *quantum meruit*. There was a verdict for the plaintiff.

The defendants asked the trial judge to rule (1) "Upon all the evidence the plaintiff is not entitled to recover," (2) "The plaintiff is not entitled to recover upon any count of this declaration," and (3) "The plaintiff is not entitled to recover upon the *quantum meruit* count of his declaration." These requests for rulings were

refused and the defendants excepted. In answer to a specific question the jury found that the plaintiff was not a partner of Fischel; and to the question "Was the payment of a commission to the plaintiff upon the Braus lease dependent upon a condition which had not been performed prior to July 31, 1914, [the date of the writ]?" they answered in the negative, and found for the plaintiff.

Braus was the lessee of the premises 33, 35, 37 Tremont Street, Boston. The largest item in the account was for a commission in obtaining this lease for the defendants. The defendants contend that Fischel was a partner of the plaintiff.

To prevent the plaintiff's recovery because of the alleged partnership with Fischel, it was not enough to show that they held themselves out as partners and could be considered such by their creditors. It was necessary to show that they were partners between themselves and not merely partners as to third persons; that Fischel was in fact a partner of the plaintiff and entitled with him to bring the action. As stated by Chief Justice Shaw in *Bishop v. Hall*, 9 Gray, 430, 432, "It is not enough that parties held themselves out or suffered themselves to be held out as partners; this might be sufficient to charge them as defendants, either in contract, or for negligence or want of skill; but the same proof, when partnership was set up to prevent one from recovering, would wholly fail of establishing it." Whether they were in fact partners depended upon the agreement of the parties. *McMurtrie v. Guiler*, 183 Mass. 451. And as the evidence was conflicting, this question was properly submitted to the jury. *Adamson v. Guild*, 177 Mass. 331.

There was some evidence that the plaintiff, acting as a real estate broker, contracted with the defendants to procure for them the Braus lease for a commission of \$1,116.72, and two other leases to other tenants, one for a commission of \$839.38 and one for a commission of \$160; that these leases were obtained; that the plaintiff performed his part of the contract, and the defendants refused to pay him. Upon establishing these facts the plaintiff could recover on the account annexed. *Lovell v. Earle*, 127 Mass. 546. There also was evidence tending to show that the plaintiff agreed to secure the Braus lease for the defendants, but was not to receive the agreed commission of \$1,116.72 until

the premises were rented for "as much or more than you pay Braus," and that the plaintiff was to assist by securing a sublease for the defendants without compensation. It was the contention of the plaintiff that he fully performed his agreement and that the defendants refused and neglected to co-operate with him; that "if he [the plaintiff] had been let alone in the management of the estate and had had a little co-operation from the defendants," the premises could have been rented for \$25,000 a year. There was other evidence tending to show that the defendants, by their lack of diligence and failure to aid the plaintiff, prevented the estate from returning the amount stated. Upon these facts the plaintiff had the right to go to the jury on the *quantum meruit* count and recover the value of his services. See *Gillis v. Cobe*, 177 Mass. 584; *Hayward v. Leonard*, 7 Pick. 181.

There was no error in refusing to order the plaintiff to elect upon which count he would proceed. The counts were not inconsistent and with the conflicting evidence on each count, it could not be known which view of the case the jury would accept. *Young v. Hayes*, 212 Mass. 525, 532.

The defendants were desirous of controlling the leased premises and securing the Braus lease for purposes connected with their business. After the defendants had accepted the offer of Braus, the plaintiff, on inspecting the lease, found that Braus was paying a yearly rental of \$14,000 and taxes. There is no evidence that this fact was made known to the defendants. While a broker must act in perfect good faith and disclose to his employer every material fact known to him, it does not appear that the rent paid by Braus was a fact of material importance to the defendants; and even if it were such, the defendants did not call the court's attention to this question. They asked for no ruling relating to this aspect of the case and did not except to the rulings given. This contention, therefore, is not now open to the defendants.

We find no error of law in the conduct of the trial.

Exceptions overruled.

ROBERT SIEGEL vs. ANNA THERN.

Suffolk. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Admissions, Remoteness, Of value. Husband and Wife. Agency, Existence of relation.

Where at the trial of an action of contract a material issue is, whether a certain agreement for the sale of real estate, purporting to be signed and sealed by the defendant's husband as her agent, was authorized by her, testimony of a witness, that at a trial of another action between different parties he heard the defendant testify that she gave full authority to her husband to do with the property as he pleased, is admissible.

At the trial of an action for breach of a contract for the sale of certain real estate by the defendant to the plaintiff, a real estate expert called by the plaintiff, having stated that he viewed the premises about three weeks before the trial, testified as to their value. The defendant alleged a general exception to the admission of the testimony, and in this court contended that the evidence was inadmissible since it related to the value of the premises at the time of the trial and not at the time of the breach of the contract. *Held*, that the exception must be overruled, because the record did not show that the witness was permitted to testify as to the value of the premises at the time of the trial.

CONTRACT for breach of an agreement in writing and under seal by the defendant to sell to the plaintiff premises at the corner of Hansborough Street and Blue Hill Avenue in that part of Boston which formerly was Dorchester. Writ dated August 13, 1915.

In the Superior Court the case was tried before *Morton, J.*

The testimony of the real estate expert, referred to in the opinion, was that at the request of the counsel for the plaintiff he had viewed the premises in question about three weeks before the trial of the case in the Superior Court; that he did not go inside; that he reached his estimate on the basis of the rental value; that he was informed by the plaintiff that the rental was \$140 per month; that in his opinion the fair market value of the property was \$16,700, and that it was more valuable as a possible site for stores.

The defendant excepted generally to this evidence.

Other material evidence and exceptions of the defendant are described in the opinion. There was a verdict for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

The case was submitted on briefs.

J. J. Gaffney & A. A. Sondheim, for the defendant.

F. P. Garland & S. B. Stein, for the plaintiff.

CARROLL, J. This is an action of contract for the breach of an agreement for the sale of real estate. The agreement was signed by the plaintiff and by the defendant's husband, who was alleged to have acted for her with her authority. The defendant excepted to the statement of a witness that at a trial in another case between "parties other than the parties to this suit," he heard Mrs. Thern testify "that she gave full authority to Mr. Thern to do with the houses as he pleased." Clearly this evidence was admissible: it was an acknowledgment by the defendant that her husband was authorized to act for her. *Phillips v. Middlesex*, 127 Mass. 262. *Stone v. Stone*, 191 Mass. 371, 376.

The cases of *Costigan v. Lunt*, 127 Mass. 354, and *Jaquith v. Morrill*, 204 Mass. 181, relied on by the defendant, are not in conflict with this decision.

A real estate expert, who viewed the premises about three weeks before the trial, testified as to their value. It is the contention of the defendant that this evidence was inadmissible, because it was evidence of the value of the premises at the time of the trial, and not evidence of their value at the time when the agreement was broken, — more than a year before the date of the trial. This exception must be overruled. The record does not show that the witness was permitted to testify as to the value of the premises at the time of the trial.

No other exceptions of the defendant are now argued on her brief, and we consider them waived.

Exceptions overruled.

MARGARET TOBIN vs. GILES TAINTOR.

Middlesex. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Notice. Letter. Snow and Ice. Evidence, Presumptions and burden of proof.

Under St. 1908, c. 305, which makes a notice in writing of the time, place and cause of the injury a condition precedent to recovery for injury from a defective condition of a building caused by or consisting in part of snow or ice and provides that "Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions," a proper notice in writing sent by mail to the owner of the building in control of it is a compliance with the statute.

In an action against one owning and controlling a building for personal injuries caused by snow and ice from the defendant's building falling upon the plaintiff when he was travelling on the adjoining public sidewalk, the defendant denied that he had received notice of the time, place and cause of the injury as required by St. 1908, c. 305. The plaintiff's attorney testified that three days after the injury he gave notice to the defendant by mailing a letter to him at his business address in Boston stating the time, place and cause of the accident and claiming damages, and that on the corner of the envelope was printed a request to return the letter, if not delivered, to the address of the writer there stated and that the letter was not returned. The defendant testified that this notice was not received by him. *Held*, that there was evidence that the notice was sent and received and that it could not be said as matter of law that the notice did not reach the defendant.

The depositing of a letter properly addressed with postage prepaid in the regular mail chute of an office building with directions for the return of the letter if not delivered printed on the envelope, and the fact that the letter was not returned, are *prima facie* evidence that the letter was received, there being a presumption of fact that the post office officials and employees did their duty.

TORT, by a minor by her father and next friend, for personal injuries sustained on February 8, 1911, by reason of snow and ice falling upon her from an occupied building of the defendant on Gore Street in the part of Cambridge called East Cambridge, when the plaintiff was travelling on the adjoining public sidewalk of that street. Writ dated October 15, 1912.

In the Superior Court the case was tried before *Sisk, J.* It is stated in the bill of exceptions that "there was evidence which warranted the jury in bringing in a verdict for the plaintiff, as they

did, if a due and sufficient notice had been given in accordance with the provisions of St. 1908, c. 305." The plaintiff contended that she had given such a notice and the defendant denied that he had received such a notice. The evidence upon this subject is described in the opinion. The judge refused to rule as matter of law that the defendant had received no notice in compliance with the statute. He submitted the question to the jury, who returned a verdict for the plaintiff in the sum of \$449.75. The defendant alleged exceptions, it being stipulated by the parties that, if the judge was wrong in submitting the case to the jury, judgment was to be entered for the defendant; otherwise, judgment was to be entered on the verdict.

G. Taintor, pro se.

W. H. Buie, (C. H. Morris with him,) for the plaintiff.

CARROLL, J. The plaintiff while a traveller upon a public street in Cambridge on February 8, 1911, was injured by snow and ice, from the defendant's occupied building, falling upon her. The question in the case is whether due and sufficient notice was given in accordance with St. 1908, c. 305. The plaintiff's attorney testified that on February 11, 1911, he gave notice to the defendant by mailing a letter, postage prepaid, to him at No. 53 State Street, Boston, Mass., stating the time, place and cause of the accident and claiming damages. On the envelope was a notice "return to Room 306, Kimball Building, Boston, Mass." The letter was deposited in the regular mail chute of the Kimball Building and was not returned to the attorney. The defendant denied that he received this letter and testified that he never received any communication from the plaintiff's attorney until he received a letter dated October 22, 1912. Under this statute, St. 1908, c. 305, the due service of a proper notice on the person sought to be charged, is a condition precedent to recovery. *Baird v. Baptist Society*, 208 Mass. 29. *Sweet v. Pecker*, 223 Mass. 286. Notice is to be given to the person obliged by law to keep the building in repair and "Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions."

In *Blanchard v. Ely*, 179 Mass. 586, which was a petition to enforce a lien under Pub. Sts. c. 192, § 24, requiring a demand for

payment to be "delivered to the debtor or left at his usual place of abode," it was held that demand in proper form, sent by mail, was a compliance with the statute. In that case the notice was received by the defendant at his residence, on the day after it was mailed, but the question decided was that a demand sent by mail was properly served. That case governs the case at bar and a notice sent by mail under St. 1908, c. 305, to the person obliged by law to keep the premises in repair was properly given. There was evidence that a notice in proper form was sent by mail to the defendant and was never returned. This was some evidence that the notice was sent and received. The depositing in the mail chute in the Kimball Building of a letter properly addressed, with the postage prepaid, is *prima facie* evidence that the defendant received it. It is a presumption of fact founded on the probability that the officers of the government will do their duty. *Swampscott Machine Co. v. Rice*, 159 Mass. 404. *Johnson v. Brown*, 154 Mass. 105, 106. *Huntley v. Whittier*, 105 Mass. 391. *Briggs v. Hervey*, 130 Mass. 186. As there was evidence that the notice was sent and received, the judge could not say as matter of law that it did not reach the defendant. Notwithstanding his testimony that he did not receive it, it was a question of fact for the jury. *Shea v. New York, New Haven, & Hartford Railroad*, 173 Mass. 177, 179. *Elliott v. Baker*, 194 Mass. 518.

The language of the statute which permits the leaving of the notice with the occupant of the premises, or if there is no occupant, posting the same in a conspicuous place thereon, provides a convenient way for the giving of the notice where the landlord is unknown or if for any other reason it is difficult to deliver the notice. This language does not imply that a proper notice sent by mail to the defendant is ineffectual. *Blanchard v. Ely, supra*.
Exceptions overruled.

MARGARET GUNNING vs. D. WEBSTER KING & others.

Suffolk. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In leaving coal hole open, Res ipsa loquitur.

Where the iron cover of a coal hole in a sidewalk, that ordinarily fitted in a rabbet and was held in position by its own weight and also was held in place by a weight fastened by a heavy wire to a ring in the bottom of the cover, was found at half past three o'clock in the morning on the sidewalk eight or nine inches away from the hole with nothing attached to it and there was nothing to show when, by whom or for what purpose the cover was removed, a traveller who was injured by stepping into the hole at this time under these conditions, cannot maintain on these facts an action against the person in control of the building to which the coal hole appertained, because these facts are not evidence of negligence on his part.

The presence on a sidewalk of a coal hole cover eight or nine inches from the uncovered hole is not in itself evidence of negligence on the part of the person controlling the building served by the coal hole.

TORT against the lessees and the sublessees of the building numbered 272 on Franklin Street in Boston for personal injuries sustained at about half past three o'clock on the morning of June 28, 1907, by reason of stepping into an open coal hole in the sidewalk in front of that building when the plaintiff was walking down Franklin Street on her way to her work. Writ dated February 25, 1908.

In the Superior Court the case was tried before *King, J.* It was admitted that the coal hole and cover at the time of the plaintiff's injury were in the control of the sublessees. The defendants offered no evidence on the question of liability. At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the lessees and submitted the case to the jury as against the sublessees. The jury returned a verdict against those defendants in the sum of \$1,000; and at the request of those defendants the judge reported the case for determination by this court. If there was no evidence which justified the judge in submitting the case to the jury, judgment was to be entered for the defendants; otherwise, judgment was to be entered on the verdict.

W. U. Friend, for the defendant sublessees.

J. J. Walsh, (*J. F. Lynch* with him,) for the plaintiff.

CARROLL, J. The plaintiff was injured by stepping into a coal hole in the sidewalk in front of the premises 272 Franklin Street, Boston, about thirty minutes after three o'clock on the morning of June 28, 1907. The iron cover, about a foot in diameter, was found at the time of the accident, eight or nine inches away from the hole. The cover fitted in a rabbet and was held in position by its own weight. It also was fastened by a weight held in place by a heavy wire fastened to a ring in the bottom of the cover. There was evidence that this weight was attached to prevent "it from being lifted at night by any one trying to get in, rather than anything else." When the cover was found, nothing was attached to it.

While the cover was not on the hole, there is nothing to show when or by whom it was removed. It may have been removed by the direction of the defendants and it may have been removed without their knowledge and against their will; it may have been taken off only a moment before the plaintiff was injured and it may have been removed a much longer time; but as to these facts we are left in doubt. It is entirely a matter of conjecture when, by whom and for what purpose the cover was removed. The negligence of the defendants, if any, was in having the hole open, but there is no evidence to show that the cover was removed by them or that they knew of it. There is, therefore, no evidence of negligence and the burden resting upon the plaintiff to establish this proposition has not been maintained. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572. *Childs v. American Express Co.* 197 Mass. 337.

The fact that nothing was attached to the cover at the time of the plaintiff's injury does not tend to show neglect of the defendants. No inference of negligence on the defendants' part could be drawn from that fact. Nor does the doctrine of *res ipsa loquitur* apply. The presence of the cover on the sidewalk, eight or nine inches from the hole, is not evidence which, according to ordinary experience, warrants the inference that it was there because the defendants were careless. *Obertoni v. Boston & Maine Railroad*, 186 Mass. 481. *Wadsworth v. Boston Elevated Railway*, *supra*, and cases cited. *Deagle v. New York, New Haven, &*

Hartford Railroad, 217 Mass. 23. *Carney v. Boston Elevated Railway*, 212 Mass. 179.

According to the terms of the report judgment is to be entered for the defendants and it is

So ordered.

JOHN G. WELD vs. WINTHROP A. STILES.

Suffolk. November 16, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Implied in law. *Sale*, Rescission for failure of consideration.

In an action to recover \$275 paid by the plaintiff to the defendant for the chassis of a motor car that had been injured by fire, where there was evidence that the plaintiff had paid the price agreed upon and as between the parties had acquired title to the chassis but that the defendant refused to deliver it or to give a good title to it, it was *held* that the plaintiff was entitled to go to the jury.

CONTRACT for failure to deliver the chassis of a motor car or to return to the plaintiff \$275 paid by the plaintiff therefor. Writ in the Municipal Court of the City of Boston dated March 1, 1916.

The declaration was as follows:

"And the plaintiff says that on or about the 7th day of January, A. D., 1916, the defendant agreed with the plaintiff to sell and to deliver to him, the said plaintiff, a certain automobile chassis for the sum of Two Hundred Seventy-five Dollars (\$275), which sum of money the plaintiff paid to the defendant forthwith. That subsequently on or about the 1st day of February, A. D. 1916, the defendant refused to deliver to the plaintiff the said automobile chassis, although demand for the same was made by the plaintiff of the defendant. Neither has the defendant paid back to the plaintiff the sum of \$275 which was paid by the plaintiff to the defendant as aforesaid.

"Wherefore the plaintiff says that he is entitled to his damages from the defendant."

The defendant's answer was a general denial.

On removal to the Superior Court the case was tried before O'Connell, J. The evidence is described in the opinion. The bill

of exceptions, besides the statement of the evidence described in the opinion, contained the following statement:

"The plaintiff rested, and the defendant testified in his own behalf that on January 7, 1916, he owned this burned chassis, which he sold; that he bought it of the Liverpool and London and Globe Insurance Company and paid for it by his check; that the owner of the automobile originally, before it was burned, was a man named Connolly; that after it was burned he held it. He was ready to give it up. He did not refuse to give it up, not definitely. He wanted to show his power before he gave it up. He did not refuse absolutely to give it up. That was laying down there. Nobody had claimed it. The insurance company did not want it. They sold it to the defendant and the defendant sold it to the plaintiff."

The defendant made a motion in writing asking the judge "to direct a verdict for the defendant for the reason that upon the pleadings and the evidence the plaintiff was not entitled to recover." The judge denied the defendant's motion and refused to direct a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of \$287; and the defendant alleged exceptions.

C. W. Rowley, for the defendant.

W. F. Davis, Jr., for the plaintiff, submitted a brief.

CARROLL, J. The plaintiff bought from the defendant on January 7, 1916, a burned automobile, paying therefor the sum of \$275. He testified that it then became his property, and that the defendant was unable to make delivery of the machine. There was also evidence that the defendant said that, "on account of certain complications with the insurance company, this burned chassis at Newport he was absolutely unable to make delivery of, this automobile, or to give good title of the same to Mr. Weld." The defendant denied that he was unable to deliver the automobile. His contention was that it was to be taken by the plaintiff "just where it laid; that the defendant was under no obligation whatever to do any other thing" and "knew of no reason why Mr. Weld could not go down there and get it." The jury found for the plaintiff. The defendant moved in writing to have the judge direct a verdict in his favor, and to the denial of this motion by the judge the defendant excepted.

The declaration is for breach of an executory contract of sale. The trial proceeded on the ground of an actual sale. No question of pleading was raised and the motion of the defendant did not directly call the judge's attention to this point. In view of the evidence and the conduct of the parties, we treat the case as that of an actual sale. See *Lafrance v. Desautels*, 225 Mass. 324.

As there was evidence for the jury that the defendant refused to make delivery or to give good title to the property sold, although fully paid therefor, the judge could not grant the defendant's motion.

Exceptions overruled.

YETTE PEARL vs. G. FAUNCE WHITCOMB, administrator.

Suffolk. November 16, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Drain, Private. Municipal Corporations, Order to connect with sewer. Boston.

Where one of a number of landowners who had the right to use in common a private drain continued to use it for many years after all the others having the right had made connections with a public sewer and had ceased to use the private drain, this does not make the person who continued to exercise his right to use the drain liable for damage to property from an overflow of waste water from the drain, which was due wholly to the act of a third person who built a foundation wall across the drain and which was not due to any negligence on the part of the person who continued to use the drain.

It here was *said* that an order of the health department of Boston, addressed to a landowner who has been using a private drain, ordering him to make a connection with the public sewer in the adjoining street, does not require him to abandon the use of the private drain, where the order contains no prohibition of its use.

TORT originally against Emma C. Whitcomb of Boston, trustee under the will of Harlan P. Whitcomb of that city, who died on November 14, 1913, for damage done to a stock of boots and shoes belonging to the plaintiff by water which overflowed upon them in the basement occupied by the plaintiff in the building numbered 15 on Albany Street in Boston, the overflow being alleged to have been caused by the negligence of the defendant

in permitting a private drain in the rear of that building to become choked. Writ dated April 21, 1915.

On December 12, 1916, a suggestion of the death of Emma C. Whitcomb was filed, and an order of court was made admitting the administrator of her estate as the defendant.

In the Superior Court the case was tried before *Dana, J.* The evidence is described in the opinion. The judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the judge was wrong in ordering the verdict, judgment was to be entered for the plaintiff in the sum of \$3,000; otherwise, judgment was to be entered for the defendant on the verdict. A further stipulation in regard to the exclusion by the judge of the release referred to in the opinion has become immaterial.

J. B. Jacobs, for the plaintiff.

J. H. Devlin, Jr., for the defendant.

CARROLL, J. In January, 1914, the plaintiff occupied the basement of the building No. 15 Albany Street, Boston, and a quantity of shoes belonging to her were damaged by water overflowing from a private common drain in the rear of her tenement. At this time the real estate numbered 7 Albany Street was owned by the defendant's intestate, Emma C. Whitcomb, as trustee under the will of Harlan P. Whitcomb, who died November 14, 1913. The drain ran in the rear of both No. 7 and No. 15 Albany Street, in an alley or passageway extending to the premises No. 31 Albany Street, where it turned "at right angles in the rear of No. 31, and passing by No. 31 at the right, and entering the public sewer at the Kneeland Street end." There was evidence that the waste water coming from the defendant's building entered the drain and overflowed into the tenement of the plaintiff. There was no direct evidence that the property numbered 31 Albany Street was connected with this drain, and there was no evidence that it was connected with the Albany Street or Kneeland Street sewer, although there was evidence that an application had been made at one time by the person in possession of this property to enter the public street sewer, but the application was returned and the books of the city sewer department showed it was "not used." The records of that department "do not show any entrance by No. 31 anywhere." There was also testimony that in

1908 the owners of the buildings connected with the drain used in common by them were notified to enter the public sewer. With the exception of Mr. Whitcomb they all entered the sewer and ceased to use the drain. No such notice was at any time served on Emma C. Whitcomb.

There was evidence that "in the old part of the city of Boston, around this locality especially, there was hardly an estate that did not connect with the private drain in the rear passage as well as the sewer in the front street." The record does not show when the drain was built. One Braynard, who owned land on Albany Street, (how much does not appear, but it would seem that he was the owner of all the land having the right to discharge into the drain,) in conveying the land No. 7 Albany Street stated in his deed, "Two passageways have been laid out by me which with the drain running under said passageways into the common sewer in Albany Street are to be for the common use and benefit of the owners and occupants of the ten houses aforesaid, each owner respectively paying an equal proportion of the expense of keeping said passageways and drain in repair." "The Emergency Hospital stable which was formerly at No. 7 Albany Street," entered the public sewer in 1889.

The drain carried off the waste water from the defendant's property until January 24, 1914, when it was connected with the street sewer. There was evidence "that the foundation wall at No. 31 had cut the sewer [the common drain in the rear] right in half and they had built the other foundation wall and blocked it; cut it right off." The exact date when this was done did not appear, although there was some evidence that it was a "year or so previous." There was no evidence that the defendant's intestate or predecessors in title had notice or knowledge of the construction of this foundation wall, or of its interference with the drain.

The judge ordered a verdict for the defendant and reported the case.

The defendant, having the right to discharge the waste water from her building into the common drain, did not become liable to the plaintiff unless the plaintiff's property was injured through the defendant's neglect. See *Smith v. Lally*, 173 Mass. 365; *Hawkesworth v. Thompson*, 98 Mass. 77. It clearly appeared that

the accumulation of undistributed income. The character of the property to be turned over by the executors to the trustees is such that the amount, if any, which may be accumulated cannot be presently and exactly fixed, and under the scheme of the will any accumulation constitutes a future interest which can be ascertained only when the time for distribution comes. But this is not the only element of positive uncertainty. The fund which includes all accumulations is to be "paid over in equal shares to my children then living, and the issue of any one or more of them deceased, by right of representation." The testator left at his death five children, three of whom including the petitioner had children then living, and all the children and grandchildren also were living when the petition was brought. It is plain from the wording of the will that not only the petitioner's issue, if he did not survive, and if he left no issue, his surviving brothers and sisters, or, if they or either of them were not living, their respective surviving issue if any, would take his share, but, if any of his brothers or sisters predeceased him leaving no issue, and he survived, his share of the fund would be increased accordingly. *Denny v. Kettell*, 135 Mass. 138. *Gibbens v. Gibbens*, 140 Mass. 102, 104, 105. *Stanwood v. Stanwood*, 179 Mass. 223, 226. *Cushman v. Arnold*, 185 Mass. 165, 168. *Alexander v. McPeck*, 189 Mass. 34. *Clarke v. Fay*, 205 Mass. 228. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35. It thus appears that the Tax Commissioner before he could compute "the actual value of the interest at the time of the payment of the tax" had to determine, not only the present worth of a future fund, the entire amount of which is absolutely uncertain, but whether the petitioner probably would come into possession of the designated share of that fund as provided in the will. What has been said concerning principal applies as well to the increased income expectant upon the completion of the period of ten years, leaving fifteen years more during which the trust is to continue. The uncertainty, if less in degree, is of the same type. The basis of computation whether the expectant estate consists of principal, or of income, must be determined soundly before a result can be reached which, while just to the petitioner, also properly protects the interests of the public in the raising of revenue where the amount to be derived is of the utmost importance. The computations of the actuary appearing

in the record treat "the value of the interests of the respective legatees, taking the interest of each child of the testator and his issue as a unit," on an assumption of the present value of the estate, which because of the uncertainty of the amount of the accumulation as well as the probable increase of the property over the value shown at the testator's death, the commissioner well might deem as nothing more than an approximation, which he could not safely adopt and follow. The question before him as a public officer whose duties are prescribed by law was a question of fact concerning taxation over which the statute gives him jurisdiction. If he errs in matters of law the error may be corrected, and his decision, that the present value of the petitioner's interest could not be computed, is not shown to have been erroneous. St. 1909, c. 490, Part IV, § 20. *Gibbs v. County Commissioners*, 19 Pick. 298, 299. *Sears v. Nahant*, 208 Mass. 208. *Attorney General v. Roche*, 219 Mass. 601.

The statute, however, further provides that the commissioner, if "it is impossible to compute the present value, . . . may, with the approval of the Attorney General, effect such settlement of the tax as he shall deem to be for the best interests of the Commonwealth." But from the very language of the statute whether such action shall be taken rests in his sound discretion and judgment, and his refusal to comply with the request or demand of the petitioner that a settlement be effected is not reviewable. *French v. Jones*, 191 Mass. 522, 532, and cases cited. The decree of the Probate Court dismissing the petition should be affirmed.

Ordered accordingly.



**FREDERICK M. ELLIS vs. MEMBERS OF CIVIL SERVICE
COMMISSION.**

Suffolk. December 7, 1917. — January 4, 1918.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Police. Civil Service. Cambridge.

After the acceptance by a city of St. 1911, c. 468, every member of the police department of that city is subject to the civil service laws and the rules made

thereunder whether he is the head of the police department or an ordinary patrolman.

The adoption by the city of Cambridge of the Plan B form of city government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of the city subject to the civil service laws.

PETITION, filed on September 29, 1917, for a writ of mandamus addressed to the members of the civil service commission commanding them to authorize the petitioner's appointment as the head of the police department of the city of Cambridge and the payment to him of the salary therefor, and to recognize the petitioner's appointment to that office as being legal and not in violation of the civil service laws and the rules made thereunder.

The case was heard by *Crosby*, J. The petitioner asked the single justice to make the following rulings:

"1. Upon all the evidence and agreed facts the petitioner is entitled to a writ of mandamus as prayed for in his petition.

"2. By virtue of an ordinance of the city of Cambridge, a copy of which ordinance is annexed to the petitioner's petition, creating departments of police and fire in said city, the police department of said city is a principal department of said city and the head of said department designated in said ordinance as 'chief of police department,' is not affected as to his selection or appointment by R. L. c. 19, and acts in amendment thereof and in addition thereto or by any rule or rules made thereunder by the civil service commission.

"3. Upon all the evidence and agreed facts the police department of the city of Cambridge is a department of said city and under and by virtue of St. 1915, c. 267, Part III, § 5, the head of such department is appointed by the mayor of said city and such appointee is subject to confirmation by the city council of said city and, therefore, is not affected as to his selection or appointment by R. L. c. 19, and acts in amendment thereof and in addition thereto or by any rule or rules made thereunder by the civil service commission.

"4. Upon all the evidence and agreed facts the petitioner, appointed by the mayor of the city of Cambridge to the office of chief of the police department of the said city, is an officer of the city within the meaning of R. L. c. 19, § 9, and acts in amendment thereof and in addition thereto whose appoint-

ment under and by virtue of the ordinance of said city, a copy of which ordinance is annexed to the petitioner's petition, is subject to confirmation by the said city council, and, therefore, is not affected as to his selection and appointment by said R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission.

"5. The legal effect of St. 1911, c. 468, being 'An Act to extend the provisions of the civil service act to chiefs of police of certain cities and towns' is to bring the office of chief of police in such cities and towns as have accepted said act under the operation of the civil service laws and the rules made thereunder by the civil service commission to the same degree, effect and extent only, as respects said office, as though said office had not been excepted from the operation of R. L. c. 19, but had been included therein.

"6. The appointment of your petitioner as head of the police department of the city of Cambridge is the appointment of the head of a principal department of said city within the meaning of R. L. c. 19, § 9.

"7. The appointment of your petitioner as head of the police department of the city of Cambridge is the appointment of an officer of said city within the meaning of R. L. c. 19, § 9.

"8. If prior to the enactment of St. 1915, c. 267, the head of a police department of a city, whose appointment, subject to confirmation by the city council of said city, was within the provisions of R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission, the acceptance and adoption by such city of St. 1915, c. 267, Part III, withdrew said office from the operation of the provisions of R. L. c. 19, and acts in amendment thereof or in addition thereto or by any rule or rules made thereunder by the civil service commission."

The single justice was "of opinion and ruled that by R. L. c. 19, § 9, as amended by St. 1911, c. 468, § 1, the office of chief of a police department is subject to the civil service rules. *Attorney General v. Tillinghast*, 203 Mass. 539. *Lattime v. Hunt*, 196 Mass. 261. The effect of St. 1911, c. 468, construed in connection with R. L. c. 19, § 9, is to place chiefs of police under civil service the same as other members of the police department, regardless of any exceptions made under R. L. c. 19, § 9. Although generally

under R. L. c. 19, § 9, heads of departments are exempted from civil service, still chiefs of police by St. 1911, c. 468, § 1, are expressly made subject thereto. The fact that the appointment of a chief of police must be confirmed by the city council does not exempt the office from the civil service rules, because by the express terms of St. 1911, c. 468, § 1, such office is subject to the rules of the civil service."

The justice ruled that the petition could not be maintained, and accordingly refused to make the rulings requested by the petitioner "because unsound in law or immaterial in view of the foregoing rulings." He made an order that the petition for a writ of mandamus be denied; and the petitioner alleged exceptions.

H. F. R. Dolan, for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the respondents.

PIERCE, J. This is a petition for a writ of mandamus, brought in the Supreme Judicial Court for the county of Suffolk under R. L. c. 19, § 34, as amended by St. 1910, c. 359, to compel the respondents, as they are civil service commissioners for the Commonwealth, to authorize the appointment of the petitioner as head of the police department of the city of Cambridge and the payment of compensation therefor, and to recognize the appointment of the petitioner to said office as legal and not in violation of the civil service laws or any rule or rules made thereunder.

The first contention of the petitioner is that police commissioners, chiefs, marshals, and chiefs of police departments, by the terms of the act are exempt from civil service rules by express enumeration if not otherwise excluded by reason of their election to office by the people, by a city council or by an appointment which is subject to confirmation by the executive council or city council of any city.

An examination of the St. of 1884, c. 320, § 15, and a comparison of the order of its clauses with their arrangement as re-enacted in R. L. c. 19, § 9, make it plain that the Legislature intended that the civil service rules should apply to all members of the police department below the rank of commissioner, superintendent, marshal, or chief, regardless of the manner of their election, appointment and confirmation. It also is manifest ~~that the~~ heads of the police departments, whatever be their title,

were excepted from the civil service laws and rules which applied to all other members of the police department by the statutory limitation and definition of the words "members of" as used in the act, and not by reason of the dignity and title of any office or of the manner of election or induction to office. The effect of the acceptance of St. 1911, c. 468, by the city of Cambridge upon St. 1884, c. 320, § 15, R. L. c. 19, § 9, was that the statute thereafter read (as if originally enacted without limitation or restriction), "such rules shall apply to members of police and fire departments." So read the terms of the act make every member of the police department subject to the laws and rules of the civil service whether he be the head of the police department (a principal department) or an ordinary patrolman.

It is further contended that the St. of 1911, c. 468, so far as concerned the city of Cambridge, was repealed by implication by the adoption of a new charter, Plan B under St. 1915, c. 267, which among other provisions provides in Part III, § 6, relative to the removal of heads of departments and officers of municipal boards, as follows:

"The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board before the expiration of his term of office, except members of the school committee, officials appointed by the Governor, and assessors where they are elected by vote of the people. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing."

At the time of the adoption of the charter there was a department of the city known as the department of public safety, established under St. 1912, c. 611, and this department was a consolidation of the police and fire departments existing at the date of the passage of St. 1912, c. 611. On May 22, 1917, the city council duly passed an ordinance approved by the mayor abolishing the department of public safety and establishing a fire department and police department. It provides:

"Section 4. The police department shall be under the charge of a chief of police department who shall be the head of said department.

"Section 5. The said head of said departments shall be appointed by the mayor, subject to confirmation by the city council, for an indefinite period and the mayor may, at any time, with the approval of the city council, remove said heads of said departments or either of them, in accordance with the provisions of the city charter."

The St. of 1911, c. 468, was not expressly repealed by St. 1915, c. 267, and its provisions relating to the appointments and removals are not so inconsistent or unworkable as to involve either a surrender of granted municipal powers or an abatement or modification of any essential provision of St. 1904, c. 314, and St. 1906, c. 210.

In the matter of appointments the authority of the mayor is limited only in that his selection of the appointee must be made from a list of competent persons certified to him by the civil service commission. In the matter of removals under the civil service rules, formal charges must be preferred and an opportunity given for a public hearing. *Tucker v. Boston*, 223 Mass. 478. Under the charter the person removed "shall receive a copy of the reasons for his removal" and has a right to a hearing thereon, and by counsel to contest the same, before the city council. Before removal, under the civil service law or under the charter, the person sought to be removed shall receive a copy of the reasons for his removal, and shall, if he desires, be given a hearing before the city council. St. 1904, c. 314. St. 1915, c. 267, Part III, § 6.

The right of appeal to a District Court under St. 1911, c. 624, is not irreconcilable with the procedure of hearings upon charges before the city council sitting as a trial board under St. 1915, c. 267, Part III, § 6.

Exceptions overruled.

EVA CHARTIER, administratrix, vs. BARRE WOOL COMBING
COMPANY, LIMITED.

SAME vs. GARDNER ELECTRIC LIGHT COMPANY.

Worcester. October 2, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Contributory. Electricity. Evidence, Matters of common knowledge.

It has become a matter of common knowledge that physical harm is likely to follow contact with a wire charged with an electric current and also that copper wires are used for the transmission of such a current.

Where before the enactment of St. 1914, c. 553, a painter, whose employer had agreed to paint a large iron smoke stack on the top of a power house, twice already had ascended a ladder placed against the stack, the foot of which, instead of being put on the roof of the power house where it might have been put perfectly well, had been placed on the small adjoining roof of a substation of an electric light company, which was surrounded by a parapet wall from eight to twelve inches high enclosing a space substantially occupied by copper wires uninsulated and carrying a high voltage of electricity, plainly open to view and sizzling and hissing, and where this painter, on returning from partaking of refreshments at a neighboring hotel, went on the roof of the electric light substation without rubbers or gloves and placed one hand on the ladder ready to ascend it for the third time, and received a shock of electricity that resulted in his death, it was held, that as matter of law he was not in the exercise of due care at the time of his injury, and that neither the proprietor of the power house and stack nor the electric light company maintaining the wires was liable for causing his injury or death.

TWO ACTIONS OF TORT by the administratrix of the estate of Augustine Chartier, late of Ware, the first against the Barre Wool Combing Company, Limited, a corporation having its principal place of business at Barre, and the second against the Gardner Electric Light Company, a corporation, for causing the conscious suffering and death of the plaintiff's intestate by a shock from an electric wire carrying sixty-six thousand volts of electricity received by him on March 11, 1914, and resulting in his death on March 16, 1914. Writs dated March 3, 1915.

In the Superior Court the cases were tried together before Sanderson, J. The evidence relating to the question whether the plaintiff's intestate was in the exercise of due care is described in the

opinion. At the close of the evidence, the defendants among other requests, asked the judge to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care and that the plaintiff could not recover. The judge refused to make this and other rulings requested by the defendants and submitted the cases to the jury.

The jury returned a verdict for the plaintiff in each of the cases in the sum of \$1,500 for conscious suffering and in the sum of \$2,500 for causing death, the verdict being the same against each of the defendants. After the return of the verdicts but before their recording the presiding judge under St. 1915, c. 185, reserved leave, with the assent of the jury, to enter a verdict in each case for the defendant if upon the exceptions taken or the questions of law reserved it should be decided that such verdicts for the defendants should have been entered. Each of the defendants alleged exceptions.

F. F. Dresser, (*G. P. Hughes* with him,) for the defendant in the first case.

C. C. Milton, (*F. L. Riley* with him,) for the defendant in the second case.

E. H. Vaughan & G. D. Storrs, for the plaintiff, submitted a brief.

PIERCE, J. At the time of the accident the intestate was in the employ of one Gauette as a painter. Gauette had entered into an agreement with the defendant in the first case, the Barre Wool Combing Company, Limited, to paint an iron smoke stack for a lump sum of money. He was to furnish men, all rigging, stock and material, — everything to go right on with the job except ladders, which that defendant had and agreed to lend.

The iron stack was about one hundred and four feet high and five feet in diameter, with a permanent iron ladder running from the top to a point thirty-four feet and six inches above the roof of a power house containing a steam turbine and boiler. The roof of this building was eighty-two feet by fifty-two feet and was clear and unobstructed. The stack stood separate and some feet distant from the side of the power house.

Adjoining the power house and two feet and four inches distant from the iron stack was a small building, which stood on land of the Barre Wool Combing Company, Limited, but was built,

owned, and controlled by the defendant in the second case, the Gardner Electric Light Company. This building was used by the last named defendant as a transformer station to furnish high voltage electric current delivered there by the Connecticut River Transmission Company from generating stations on the Connecticut and Deerfield rivers. The roof of the transforming station was higher than the roof of the power house. The coping of the substation at its northeast corner where it joined the power house was fifteen inches and the coping at its northwest corner where it adjoined the power house was three feet and two inches above the roof of the power house. The roof of the substation was a few inches below the coping at its east side and a foot and one half at its west side. It was twenty-seven and a half feet measured east and west and thirteen feet in width, and was entirely surrounded and enclosed by a parapet wall of brick with a small stone coping eight to twelve inches wide. Upon the roof of the substation and within the enclosure were nine standards about four feet in height above the roof occupying with the wires substantially all the space within the parapet. The base of them was concrete that went up perhaps half the height, and above were posts and bell shaped pieces — insulators — to which choke coils and power wires carrying a voltage of sixty-six thousand volts were attached. The posts of those nearest the smoke stack were about five feet from the edge of the substation roof, and the base of the concrete was about three and one half feet from the edge of the substation roof. The power wires were open to view, were not insulated and were “sizzling” before and at the time of the accident.

On the morning of the accident Gauette, the plaintiff's intestate and the other workman went with their tackle to the premises. Gauette selected of the ample supply of ladders such as he chose. He and his men put a thirty-foot extension ladder against the power house, went up from the ground to the roof, pulled it on top of the roof and then raised it against the stack. It did not reach to the foot of the iron ladder attached to the stack; then it was pulled down and they went to the substation building, stepped up on the coping, then on or over the wall or parapet and again placed the thirty-foot ladder against the stack. It was not long enough. “We lifted the thirty-foot ladder down from the

stack and down from the boiler roof on to the ground and we raised this thirty-five foot ladder we brought." There were other and longer ladders available, but no attempt was made to use or raise them from the power house. The ladder when placed rested on the substation roof, one leg a few inches distant and the other a little farther from one of the concrete posts to which the high voltage wires ran.

The intestate went up the ladder to the bottom of the iron ladder, lashed the wooden ladder to the iron ladder and then came down. He again climbed the ladder this time to the top, where he fastened his block. On coming down he appeared nervous and the three men went over to the hotel where the intestate partook of refreshments. On their return they went on the roof, the intestate without rubbers or gloves. He placed one hand on the ladder ready to go up and received an electric shock as he did so.

The accident happened before St. 1914, c. 553, and consequently the burden is on the plaintiff to prove at least the due care of the intestate. The photographs submitted at the hearing make it plain that the intestate knew or should have known the peril to life that hedged about his entrance to the roof of the substation. The copper wires were exposed to view, they were not insulated — they were unprotected; the roof space occupied was narrow and not devoted to other uses, and it was set apart and enclosed from neighboring property by a sizable parapet. It has become common knowledge that physical harm is likely to follow any contact with an electrical current, and it is equally well known that copper wires are used as the medium of the transmission of such a current. The sizzling and hissing of the wires were unmistakable and presented a warning of danger near at hand to be disregarded at one's peril. No exigency of time or of space called for the use of the substation roof as a place to rest the ladder. The roof of the power house was large and free of obstruction and there was an abundance of ladders ready for use. Knowing all the above facts, as the intestate must have done, neither he nor any one on his behalf took any precaution whatever for his safety. *French v. Sabin*, 202 Mass. 240, 242.

The sizzling wires, the restricted space within which they were confined, the obvious likelihood of harm to a person who should come near them, and the fact that the business of the intes-

tate did not necessitate going upon the dangerous roof distinguish the case at bar from *Griffin v. United Electric Light Co.* 164 Mass. 492, *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495, and *Prince v. Lowell Electric Light Corp.* 201 Mass. 276.

The motion to direct a verdict for each defendant should have been granted. It follows that there is no occasion to consider whether the plaintiff was upon the premises by the express or implied invitation of either defendant.

And it also follows that judgment in each case must be entered for the defendant. St. 1909, c. 236.

So ordered.

COMMONWEALTH vs. JOHN F. KENNEY.

Essex. November 7, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Bastardy Proceedings, Dismissal by agreement, Intervention by overseers of the poor.

After a bastardy proceeding under R. L. c. 82, begun on complaint of the mother, has been dismissed by agreement of the complainant and the putative father, it is too late for the overseers of the poor of the municipality wherein the mother has a settlement to intervene to prosecute the complaint.

St. 1913, c. 563, relative to illegitimate children and their maintenance, does not apply to a motion and application by the overseers of the poor of the municipality wherein the mother of such a child has a settlement to be permitted to intervene to prosecute a bastardy proceeding under R. L. c. 82, begun in January, 1913, on complaint of the mother relative to a child born in 1912 and dismissed on July 18, 1913, by agreement of the mother and the putative father, because by § 9 of the statute it does not affect proceedings begun before July 1, 1913.

The rights given to a municipality by R. L. c. 82, § 18, which provides that no settlement made by the father and mother of an illegitimate child shall relieve the father from liability to any city or town or the Commonwealth for the support of the child, cannot be enforced by permitting the overseers of the poor to intervene to prosecute a proceeding, begun under that chapter on complaint of the mother, after that proceeding has been dismissed by agreement of the mother and the putative father.

COMPLAINT, received and sworn to on January 28, 1913, in the Central District Court of Northern Essex under R. L. c. 82, alleg-

ing that the defendant was the father of the illegitimate child of the complainant, Etta G. DeCourcy.

On July 18, 1913, there was filed an agreement of the complainant and the defendant that the entry be made, "Complaint dismissed." On the same day the clerk of the court made the entry on the docket, "Dismissed as on file."

On February 23, 1917, the overseers of the poor of the city of Newburyport filed a motion to be allowed to intervene to prosecute the complaint. The motion was heard by *Quinn, J.* The material facts are stated in the opinion. The judge denied the motion, and the overseers of the poor alleged exceptions.

H. I. Bartlett, for the overseers of the poor.

G. H. McDermott, (*P. J. Nelligan* with him,) for the defendant.

CARROLL, J. This is a motion by the overseers of the poor of Newburyport to be allowed to intervene and prosecute a bastardy complaint brought by the mother against the defendant, under R. L. c. 82.

At the hearing the overseers of the poor offered to show that the complaint was entered in the Superior Court on the first Monday of March, 1913, that on July 18, 1913, the complainant, who had a settlement in Newburyport, signed an agreement to dismiss the case which was filed on the same day, and the clerk made the entry on the docket, "July 18, dismissed as on file." The child was born April 27, 1912. The defendant paid the board of the child "most of the time from sometime in June, 1912, to sometime in February, 1915." The complainant received nothing from the defendant, except his promise to pay for the child's board. In April, 1915, the defendant was brought before the "District Court in Haverhill on a complaint under St. 1913, c. 563." The case was dismissed "because of the bastardy complaint." Thereafter application was made to the overseers of the poor of Newburyport for assistance in the support of the child. They then learned for the first time that there was such a child and of the proceedings that had been had. They paid \$2.50 per week from June 10, 1915, and still are paying at that rate for the child's support.

The judge denied the motion to intervene to prosecute and refused to admit the application of the overseers to prosecute the case, to which ruling they excepted.

The original complaint was brought under R. L. c. 82, providing for the maintenance of bastard children. St. 1913, c. 563, relative to illegitimate children and their maintenance, which took effect July 1, 1913, does not apply to the motion and application of the overseers in the proceedings before us, as § 9 of that statute providing for the repeal of c. 82 declares that this repeal does not affect proceedings begun before the first of July in the year 1913.

If a woman entitled to make a complaint under the bastardy act, refused or neglected to do so, the overseers of the poor where she had her settlement could make a complaint and prosecute it. R. L. c. 82, § 2. If the overseers of the poor had intervened, no complaint instituted by the mother could have been withdrawn, dismissed or settled by agreement between her and the putative father, without the consent of the overseers, unless provision was made "to the satisfaction of the court, to relieve and indemnify any parent, guardian, city, town or the Commonwealth from all charges which have accrued or may accrue for the maintenance of the child." R. L. c. 82, § 17. If this had been done the case could not have been settled except under § 17; but the overseers of the poor did not intervene until after the case was dismissed by the parties and final judgment entered. There is no provision of law which gives to the overseers of the poor the right to intervene under these circumstances. See *Haley v. Whalen*, 121 Mass. 533.

R. L. c. 82, § 18, provides, "No settlement made by the father and mother, before or after the complaint is made, shall relieve the father from liability to any city or town or the Commonwealth for the support of a bastard child." The rights, however, given under this section against the father for the support of the child, cannot be enforced by intervening in the bastardy case, after that case has been finally dismissed by the agreement of the complainant and the defendant, who were the only parties to the record.

Exceptions overruled.

REBECCA DAVID vs. JAMES E. LENNON.

Middlesex. November 7, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Poor Debtor. Officer. Notice.

Where a judgment creditor lives on the ground floor of a three apartment house, if a notice by the judgment debtor, who had been arrested in poor debtor proceedings and had recognized with surety, that he desired to take the oath for the relief of poor debtors, was placed by a constable upon a large unused ice chest belonging to the judgment creditor in the common hall on the ground floor, which had, besides the front door, three doors leading from it, two to the creditor's apartments and one to the common water closet, and from which a common stairway led to the second floor, such notice was not served upon the creditor by leaving it at his last and usual place of abode and does not satisfy the requirements of R. L. c. 168, § 34.

TORT against a constable of the city of Cambridge for a false return upon a notice of desire by a judgment debtor, one Louis Fuhrman, to take the oath for the relief of poor debtors. Writ dated May 2, 1912.

In the Superior Court the action was heard by *Brown, J.*, without a jury. The plaintiff was the judgment creditor, who obtained his judgment against Fuhrman on December 3, 1910, for \$2,000 debt or damages and \$52.28 costs. Other material facts and the terms of the report by the trial judge are set forth in the opinion.

The case was submitted on briefs.

J. J. Foley, for the defendant.

H. T. Richardson & B. H. Greenhood, for the plaintiff.

CARROLL, J. The defendant is a constable of the city of Cambridge. This action is for a false return of service on a notice to take the oath for the relief of poor debtors. The plaintiff recovered judgment against Louis Fuhrman, execution issued against him, he was arrested and recognized with surety. On March 22, 1911, he applied to take the oath for the relief of poor debtors and a notice was issued to the plaintiff, returnable April 7, 1911. The defendant made return that he had served the notice on the creditor (the plaintiff in this action), on April 4, 1911, "at

8 o'clock and 5 minutes P. M., . . . by leaving an attested copy at the last and usual place of abode." On April 7, 1911, the creditor did not appear and the oath for relief was given.

The plaintiff lived on the ground floor of a three apartment house. The common hall on the ground floor had, besides the front door, three doors leading from it, two to the plaintiff's apartment and "one to the common water closet." There was a common stairway leading from this hall to the second floor. On the night of April 4 this hallway was not lighted, the defendant "could see nothing, and had no means for striking a light." He rapped at the door, and receiving no response, tried to put the notice under the door. Being unable to do so, he found a large unused ice chest belonging to the plaintiff, which the defendant supposed was a table, and placed on it a copy of the notice in a sealed envelope. The plaintiff never received the copy of the notice and knew nothing about it until after the oath was administered to Fuhrman.

The trial judge found and ruled that the service of the notice was not made at the last and usual place of abode of the plaintiff and found for her in the sum of \$2,830.94. The case was reported solely on the question "Whether my finding and ruling relative to the service, as above set forth, was correct."

When a debtor is arrested and taken before a magistrate, if he desires to take the oath for relief of poor debtors, an attested copy of the notice of the time and place fixed for the examination, must be served on the creditor by giving such copy to the creditor or his agent, or attorney, or by leaving such copy at the last and usual place of abode "of the plaintiff or creditor, or his agent or attorney." R. L. c. 168, §§ 33, 34. It was said in *Slasson v. Brown*, 20 Pick. 436, 440, "It is essential to the rights of parties that they should have proper notice of all proceedings affecting their interests. This principle lies at the foundation of all our proceedings in courts of justice." There was no personal service in the case at bar and the copy of the notice was not served at the last and usual place of abode of the creditor. It was left in the common hallway which was occupied by other tenants of the apartment block, and where the creditor did not have the right of exclusive possession. "The mere fact that the summons is left under the same roof where a person lives, does not make it a service at

his last and usual place of abode. . . . To make such a service valid, it must be left in the part of the house which the defendant inhabits and frequents; or it is not duly served upon him, as being left at his last and usual place of abode." *Fitzgerald v. Salentine*, 10 Met. 436, 438.

It follows that according to the terms of the report, judgment is to be entered for the plaintiff on the finding.

So ordered.

SARA S. MACGILL-ALLEN vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Suffolk. November 9, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Railroad. Evidence, Competency, Materiality.

At the trial of an action against a railroad corporation for personal injuries received by a passenger when, as she was leaving a car on a train of the defendant at a station, the door of the car closed upon her hand, it appeared that in approaching the station the train ran on a straight track with a down grade of not more than three per cent, that the car was crowded and passengers were standing in the aisle near the door through which the plaintiff was to pass, and that as the plaintiff left the car she followed others. There was no evidence that there was a catch to hold the door in place when open nor of any defect in the door or its appliances, nor was there any evidence to show by whom the door was opened. *Held*, that there was no evidence warranting a finding of negligence of the defendant.

At the trial above described, a question, asked by the plaintiff in cross-examination of the conductor of the train, as to how many brakemen the law required a railroad to have on the platform of its trains, properly was excluded.

It also was proper to exclude at the same trial, where there was no evidence to show that the brakeman opened the door, a question asked the same conductor as to whether the brakeman "was . . . in the habit of fastening the door back, opening the door."

TORT for personal injuries received by the plaintiff when, as she was leaving a train of the defendant, her hand was crushed by the door closing upon it. Writ dated August 30, 1913.

In the Superior Court the case was tried before *Lawton, J.* The material evidence is described in the opinion.

The questions referred to in the last paragraph of the opinion were asked by the plaintiff in cross-examination of the conductor of the train upon which the accident happened, and were as follows:

"You have stated you are familiar with the law. What is the law in regard to the brakeman on a five-car train? How many brakemen does the law require a road, railroad, — New York, New Haven & Hartford, or any road within the Commonwealth of Massachusetts, — to have on the platforms of its trains?"

"Was he (the brakeman) in the habit of fastening the door back, opening the door?"

The judge excluded both of these questions.

At the close of the evidence the judge ordered a verdict for the defendant, and the plaintiff alleged exceptions.

M. W. Cottle, for the plaintiff.

Joseph Wentworth, for the defendant.

CARROLL, J. The plaintiff was a passenger on one of the defendant's trains. She boarded the train at Atlantic, and at South Boston where the train stopped, when about to alight, her left hand was caught in the jamb of the forward door of the car in which she was travelling. At this station the track is straight, the grade as estimated by an engineer called by the plaintiff was about two and one half to three per cent down grade toward Boston. The car upon which the plaintiff was travelling was crowded, people were standing in the aisle near the forward door through which the plaintiff passed. She followed the passengers leaving the car and stepped on the platform for a moment to allow some people to precede her. As she was going upon the platform of the car, she saw the brakeman approaching "through the aisle of the forward coach, and heard him shout, 'Look out for your hand;' that the warning came too late, for the door fell to, crushing the fingers of her hand." There was evidence from one witness that "as each passenger went out, they held the door. . . . I saw three or four men go out ahead of her." There was nothing to show that there was a catch to hold the door in place when open, and there was no evidence of any defect in the door or its appliances; although there was evidence tending to show that passengers held the door open as they left the car, nothing appeared to show by whom or at what time the door was opened.

We are unable to distinguish this case from *Casey v. New York, New Haven, & Hartford Railroad*, 207 Mass. 443, *Hunt v. Boston Elevated Railway*, 201 Mass. 182, *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254, where it was held that the falling of a window or the closing of a door, without evidence of a defect or some evidence of negligence of the company's servants, is not enough to warrant the submission of the case to the jury. The plaintiff contends that the case at bar differs from *Casey v. New York, New Haven, & Hartford Railroad*, *supra*, because in that case there was no evidence of a down grade when the train stopped, and further, that in the case at bar there was nothing to show that the door was opened by a passenger. In the *Casey* case there was some evidence that the door was opened by a companion of the plaintiff, but this fact does not distinguish the case from the one before us. The door may have been opened by a passenger or by someone else; but the difficulty with the plaintiff's case is that there was nothing to show by whom the door was opened. In *Hunt v. Boston Elevated Railway*, *supra*, the plaintiff was injured while a car was rounding a curve, by the door coming out of the socket and striking her hand. It did not appear in that case by whom the door was freed from the catch. In *Faulkner v. Boston & Maine Railroad*, *supra*, there was no evidence that the window was raised by the defendant's employees. A grade of two and one half to three per cent does not show negligence; nor did this fact require the presence of a brakeman at the door of each car where passengers were alighting, and his absence from the platform was not negligence. In *Kellogg v. Boston & Maine Railroad*, 210 Mass. 324, *Silva v. Boston & Maine Railroad*, 204 Mass. 63, the car door was opened by employees of the defendant and for this reason these cases are not applicable to the case at bar.

The questions put to the conductor as to the number of brakemen required by law on a five car train, and whether the brakeman "was . . . in the habit of fastening the door back, opening the door" were excluded properly.

Exceptions overruled.

PATRICK J. O'TOOLE'S (dependent's) CASE.

Suffolk. November 9, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act.

Where a city, that had accepted St. 1913, c. 807, hired for work on its highways a steam roller at \$15 a day, its owner furnishing the "engineer, coal, wood and steam" and the city employees at different times helping the engineer to roll up the curtains, put coal in the bunkers and fill the tank, and a workman employed by the city to spread cracked stone on the roads, who once had helped the engineer of the steam roller to roll up the curtains and had ridden with him on the steam roller and had asked him to teach him how to run it and on two occasions had operated the roller a short distance, one day when the men had stopped work between twelve and one o'clock was called by the engineer to the roller, which was at rest, where the two men engaged in conversation that "had nothing to do with the work," when the engineer started the machine "to blow off some steam" and soon the roller began to coast down a hill and got beyond the control of the engineer and, crossing a sidewalk, crushed the employee of the city between the piazza of a house and the wheels of the roller so that he died as the result of his injuries, his dependent widow is not entitled to claim compensation under the workmen's compensation act, because the injuries that caused the death of the employee did not arise out of or in the course of his employment.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation upon the claim, as a dependent, of Bridget O'Toole, the widow of Patrick J. O'Toole, late of Boston, who was injured when in the employ of the city of Boston on August 4, 1915, and died as the result of the injury, the claim being made under St. 1913, c. 807, accepted by the city of Boston.

The case was heard by *Jenney, J.* The evidence reported is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, awarding to Bridget O'Toole as the dependent widow of Patrick J. O'Toole \$10 a week for a period of four hundred weeks from August 4, 1915. The city of Boston appealed.

W. J. O'Malley, for the city of Boston.

D. J. Reardon, (*M. T. Hart* with him,) for the dependent widow.

CARROLL, J. There was evidence that the city of Boston hired a steam roller at \$15 a day for work on its highways, the contractor who owned it furnishing "engineer, coal, wood and steam." The employees of the city at different times helped the engineer, Gilbert Peloquin, roll up the curtains, put coal in the bunkers and fill the tank. Patrick J. O'Toole was employed by the city, in spreading cracked stone on the roads. The engineer testified that the only time this employee helped him around the roller was when he helped to roll up the curtains, though the employee "had ridden with him before on the steam roller and had asked him to teach him [the employee] how to run it." On two occasions before the accident O'Toole operated the roller a short distance, while being taught. At another time he rode on the roller. On the day of the accident the men stopped work between twelve and one o'clock. It was raining very hard and while the roller was at rest the engineer called O'Toole, saying, "Come here, Pat, I want to speak to you." They engaged in conversation. The "conversation was just social and had nothing to do with the work," O'Toole speaking of a transfer to another department. They "spoke a few words." O'Toole said he was getting wet and stepped on the roller. The engineer started the machine "to blow off some steam." After going up and down the street, he stopped on top of the hill. The roller started to coast down the hill and when the engineer took hold of the throttle, the "gears came up; the pin which holds the gears had come out . . . the machine crossed over the sidewalk." O'Toole was caught between the piazza of the house and the wheels of the roller. This was about "ten minutes to one or twenty minutes to one." He died as a result of these injuries.

These controlling facts show that, while O'Toole was on the roller, he was speaking to the man in charge about his own affairs and his presence there related solely to his own interests. His occupation did not require him to be there. He was there discussing his own prospects and his transfer to another department, or matters "just social and had nothing to do with the work." He was not called by the engineer to perform any work or to aid in any way in carrying on the business of the employer. The testimony, that Peloquin said after the injury that O'Toole was his helper, does not contradict these essential facts; indeed, there

was no evidence to contradict them or to show that when injured the employee was occupied in the work for which he was hired and in which the city was engaged. It follows from this that the injury to the employee did not result from his employment and did not arise out of or in the course of it, and there can be no recovery. *Savage's Case*, 222 Mass. 205, and cases cited.

There are cases which hold that an employee is protected by the workmen's compensation act, although not at the time actually engaged in the work for which he was hired. If the employee is injured in going to or returning from his work upon the master's premises, or on premises available for the purpose, or if during intervals of leisure which occur in the course of his employment he is injured, he may still be within the scope of his employment and entitled to the benefits of the act. *Sundine's Case*, 218 Mass. 1. *Blovelt v. Sawyer*, 6 W. C. C. 16. But the principle of these cases is not applicable where the servant leaves the sphere of his employment for some purpose of his own entirely disconnected with and not in any way incidental to the employment.

The decree is to be reversed.

Decree to be entered for the employer.

**MERTON H. WHEELOCK vs. CONSTANTENOS ZEVITAS & another
& trustees.**

Suffolk. November 12, 1917. — January 5, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Agent's duty of fidelity. *Practice*, Civil, Parties, Election between counts, Exceptions, Waiver. *Partnership*. *Broker*, Commission. *Contract*, Implied. *Waiver*.

The mere fact, that two persons held themselves out as partners doing business as real estate brokers and could be considered such by their creditors, is not a bar to an action brought by one only of them for a commission as broker, if it does not also appear that by agreement between themselves they were partners.

Where the evidence as to such an agreement is conflicting, the question of its existence is for the jury.

Where, at the trial of an action upon an account annexed for commissions alleged to have been earned by the plaintiff as a real estate broker, there is evidence

tending to show that the plaintiff as a broker contracted with the defendant to procure for him for certain commissions a lease to him of certain buildings and tenants who should sublet from the defendant, that the leases and tenants were obtained, that the plaintiff performed his part of the contract and that the defendant refused to pay him, the question of the defendant's liability is for the jury.

At the trial of an action upon a *quantum meruit* for the value of services as a real estate broker alleged to have been rendered by the plaintiff to the defendant, there was evidence tending to show that the plaintiff agreed to secure for the defendant a lease of certain buildings for which he was to receive a certain commission, but that he was not to receive his commission until the premises were rented for as much as or more than the defendant paid for his lease, that the plaintiff was to assist in placing subleases for the defendant without compensation, that the plaintiff performed his part of the agreement, and that, if he had been let alone in the management of the property and had had a little co-operation from the defendant, the property would have been sublet for a sum in excess of that paid by the defendant, but that the defendant, by his lack of diligence and failure to aid the plaintiff, prevented the property from making such return. *Held*, that the plaintiff had a right to go to the jury on the question whether he should recover the value of his services.

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker, and there is evidence tending to show that the services described in the first count were rendered, and also evidence that such services were not to be paid for until the real estate in question made a certain return to the defendant, which it had not done, but that the failure of such a return was due to lack of diligence and failure of the defendant to aid the plaintiff in bringing about such a return, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them.

If, at the trial of an action by a real estate broker for his commission, there is evidence tending to show that the plaintiff did not disclose to the defendant a material fact which he learned while acting in the course of his duties as the defendant's broker, the defendant in order to rely on the defence of want of fidelity of the plaintiff must call the attention of the trial judge specifically to such a contention either by a request for a ruling or in some other way; and, if he does not do so, he cannot raise the contention for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover.

In this case it was *said* that the information which the plaintiff did not communicate to the defendant did not appear to have been in regard to a fact of material importance to the defendant.

CONTRACT, with a declaration as amended in two counts, the first count being upon an account annexed containing six items, amounting in all to \$2,370.21 for commissions "on lease 33, 35, 37 Tremont St., Boston, from Arthur L. Braus to" the defendants, for "commission on lease of store and basement, 35 Tremont St., from" the defendants to William Sheinwald, for "commission

on lease 3d floor, 37 Tremont St.," from the defendants to "Imperial Photographic Studio, Inc.," and for interest. The second count was upon a *quantum meruit* for \$2,500 for services rendered to the defendants "in connection with leasing and subleasing the estate known as 33, 35 and 37 Tremont Street, Boston, during the years 1911, 1912, 1913 and 1914." Writ dated July 31, 1914.

In the Superior Court the action was tried before *Chase, J.*

One contention of the defendants was that, if they were indebted to the plaintiff, they were indebted to him jointly with one William V. Fischel, who was living and should have been joined as a plaintiff in the action. The evidence on this issue was conflicting. At the close of the evidence the defendants moved that a verdict be ordered for them. The motion was denied, and a special question was submitted to the jury, "Were the plaintiff and Fischel partners?" The jury answered the question in the negative.

The defendants received a sublease of the premises in question from Braus at a yearly rental of \$18,500, they paying the taxes.

Other evidence on the other issues involved is described in the opinion, where also are set out other contentions and requests of the defendants for rulings. A further special question, "Was the payment of a commission to the plaintiff upon the Braus lease dependent upon a condition which had not been performed prior to July 31, 1914, [the date of the writ]?" was submitted to the jury, and was answered in the negative.

The jury found for the plaintiff in the sum of \$2,370.21; and the defendants alleged exceptions.

J. H. Casey, (F. J. Muldoon with him,) for the defendants.

J. M. Hoy, for the plaintiff.

CARROLL, J. The plaintiff seeks to recover for services performed in obtaining a lease of a certain building for the defendants and in securing tenants for the same. The declaration is in two counts, the first on the account annexed and the second upon a *quantum meruit*. There was a verdict for the plaintiff.

The defendants asked the trial judge to rule (1) "Upon all the evidence the plaintiff is not entitled to recover," (2) "The plaintiff is not entitled to recover upon any count of this declaration," and (3) "The plaintiff is not entitled to recover upon the *quantum meruit* count of his declaration." These requests for rulings were

refused and the defendants excepted. In answer to a specific question the jury found that the plaintiff was not a partner of Fischel; and to the question "Was the payment of a commission to the plaintiff upon the Braus lease dependent upon a condition which had not been performed prior to July 31, 1914, [the date of the writ]?" they answered in the negative, and found for the plaintiff.

Braus was the lessee of the premises 33, 35, 37 Tremont Street, Boston. The largest item in the account was for a commission in obtaining this lease for the defendants. The defendants contend that Fischel was a partner of the plaintiff.

To prevent the plaintiff's recovery because of the alleged partnership with Fischel, it was not enough to show that they held themselves out as partners and could be considered such by their creditors. It was necessary to show that they were partners between themselves and not merely partners as to third persons; that Fischel was in fact a partner of the plaintiff and entitled with him to bring the action. As stated by Chief Justice Shaw in *Bishop v. Hall*, 9 Gray, 430, 432, "It is not enough that parties held themselves out or suffered themselves to be held out as partners; this might be sufficient to charge them as defendants, either in contract, or for negligence or want of skill; but the same proof, when partnership was set up to prevent one from recovering, would wholly fail of establishing it." Whether they were in fact partners depended upon the agreement of the parties. *McMurtrie v. Guiler*, 183 Mass. 451. And as the evidence was conflicting, this question was properly submitted to the jury. *Adamson v. Guild*, 177 Mass. 331.

There was some evidence that the plaintiff, acting as a real estate broker, contracted with the defendants to procure for them the Braus lease for a commission of \$1,116.72, and two other leases to other tenants, one for a commission of \$839.38 and one for a commission of \$160; that these leases were obtained; that the plaintiff performed his part of the contract, and the defendants refused to pay him. Upon establishing these facts the plaintiff could recover on the account annexed. *Lovell v. Earle*, 127 Mass. 546. There also was evidence tending to show that the plaintiff agreed to secure the Braus lease for the defendants, but was not to receive the agreed commission of \$1,116.72 until

the premises were rented for "as much or more than you pay Braus," and that the plaintiff was to assist by securing a sublease for the defendants without compensation. It was the contention of the plaintiff that he fully performed his agreement and that the defendants refused and neglected to co-operate with him; that "if he [the plaintiff] had been let alone in the management of the estate and had had a little co-operation from the defendants," the premises could have been rented for \$25,000 a year. There was other evidence tending to show that the defendants, by their lack of diligence and failure to aid the plaintiff, prevented the estate from returning the amount stated. Upon these facts the plaintiff had the right to go to the jury on the *quantum meruit* count and recover the value of his services. See *Gillis v. Cobe*, 177 Mass. 584; *Hayward v. Leonard*, 7 Pick. 181.

There was no error in refusing to order the plaintiff to elect upon which count he would proceed. The counts were not inconsistent and with the conflicting evidence on each count, it could not be known which view of the case the jury would accept. *Young v. Hayes*, 212 Mass. 525, 532.

The defendants were desirous of controlling the leased premises and securing the Braus lease for purposes connected with their business. After the defendants had accepted the offer of Braus, the plaintiff, on inspecting the lease, found that Braus was paying a yearly rental of \$14,000 and taxes. There is no evidence that this fact was made known to the defendants. While a broker must act in perfect good faith and disclose to his employer every material fact known to him, it does not appear that the rent paid by Braus was a fact of material importance to the defendants; and even if it were such, the defendants did not call the court's attention to this question. They asked for no ruling relating to this aspect of the case and did not except to the rulings given. This contention, therefore, is not now open to the defendants.

We find no error of law in the conduct of the trial.

Exceptions overruled.

ROBERT SIEGEL vs. ANNA THERN.

Suffolk. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Admissions, Remoteness, Of value. Husband and Wife. Agency, Existence of relation.

Where at the trial of an action of contract a material issue is, whether a certain agreement for the sale of real estate, purporting to be signed and sealed by the defendant's husband as her agent, was authorized by her, testimony of a witness, that at a trial of another action between different parties he heard the defendant testify that she gave full authority to her husband to do with the property as he pleased, is admissible.

At the trial of an action for breach of a contract for the sale of certain real estate by the defendant to the plaintiff, a real estate expert called by the plaintiff, having stated that he viewed the premises about three weeks before the trial, testified as to their value. The defendant alleged a general exception to the admission of the testimony, and in this court contended that the evidence was inadmissible since it related to the value of the premises at the time of the trial and not at the time of the breach of the contract. *Held*, that the exception must be overruled, because the record did not show that the witness was permitted to testify as to the value of the premises at the time of the trial.

CONTRACT for breach of an agreement in writing and under seal by the defendant to sell to the plaintiff premises at the corner of Hansborough Street and Blue Hill Avenue in that part of Boston which formerly was Dorchester. Writ dated August 13, 1915.

In the Superior Court the case was tried before *Morton, J.*

The testimony of the real estate expert, referred to in the opinion, was that at the request of the counsel for the plaintiff he had viewed the premises in question about three weeks before the trial of the case in the Superior Court; that he did not go inside; that he reached his estimate on the basis of the rental value; that he was informed by the plaintiff that the rental was \$140 per month; that in his opinion the fair market value of the property was \$16,700, and that it was more valuable as a possible site for stores.

The defendant excepted generally to this evidence.

Other material evidence and exceptions of the defendant are described in the opinion. There was a verdict for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

The case was submitted on briefs.

J. J. Gaffney & A. A. Sondheim, for the defendant.

F. P. Garland & S. B. Stein, for the plaintiff.

CARROLL, J. This is an action of contract for the breach of an agreement for the sale of real estate. The agreement was signed by the plaintiff and by the defendant's husband, who was alleged to have acted for her with her authority. The defendant excepted to the statement of a witness that at a trial in another case between "parties other than the parties to this suit," he heard Mrs. Thern testify "that she gave full authority to Mr. Thern to do with the houses as he pleased." Clearly this evidence was admissible: it was an acknowledgment by the defendant that her husband was authorized to act for her. *Phillips v. Middlesex*, 127 Mass. 262. *Stone v. Stone*, 191 Mass. 371, 376.

The cases of *Costigan v. Lunt*, 127 Mass. 354, and *Jaquith v. Morrill*, 204 Mass. 181, relied on by the defendant, are not in conflict with this decision.

A real estate expert, who viewed the premises about three weeks before the trial, testified as to their value. It is the contention of the defendant that this evidence was inadmissible, because it was evidence of the value of the premises at the time of the trial, and not evidence of their value at the time when the agreement was broken, — more than a year before the date of the trial. This exception must be overruled. The record does not show that the witness was permitted to testify as to the value of the premises at the time of the trial.

No other exceptions of the defendant are now argued on her brief, and we consider them waived.

Exceptions overruled.

MARGARET TOBIN vs. GILES TAINTOR.

Middlesex. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Notice. Letter. Snow and Ice. Evidence, Presumptions and burden of proof.

Under St. 1908, c. 305, which makes a notice in writing of the time, place and cause of the injury a condition precedent to recovery for injury from a defective condition of a building caused by or consisting in part of snow or ice and provides that "Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions," a proper notice in writing sent by mail to the owner of the building in control of it is a compliance with the statute.

In an action against one owning and controlling a building for personal injuries caused by snow and ice from the defendant's building falling upon the plaintiff when he was travelling on the adjoining public sidewalk, the defendant denied that he had received notice of the time, place and cause of the injury as required by St. 1908, c. 305. The plaintiff's attorney testified that three days after the injury he gave notice to the defendant by mailing a letter to him at his business address in Boston stating the time, place and cause of the accident and claiming damages, and that on the corner of the envelope was printed a request to return the letter, if not delivered, to the address of the writer there stated and that the letter was not returned. The defendant testified that this notice was not received by him. *Held*, that there was evidence that the notice was sent and received and that it could not be said as matter of law that the notice did not reach the defendant.

The depositing of a letter properly addressed with postage prepaid in the regular mail chute of an office building with directions for the return of the letter if not delivered printed on the envelope, and the fact that the letter was not returned, are *prima facie* evidence that the letter was received, there being a presumption of fact that the post office officials and employees did their duty.

TORT, by a minor by her father and next friend, for personal injuries sustained on February 8, 1911, by reason of snow and ice falling upon her from an occupied building of the defendant on Gore Street in the part of Cambridge called East Cambridge, when the plaintiff was travelling on the adjoining public sidewalk of that street. Writ dated October 15, 1912.

In the Superior Court the case was tried before *Sisk, J.* It is stated in the bill of exceptions that "there was evidence which warranted the jury in bringing in a verdict for the plaintiff, as they

did, if a due and sufficient notice had been given in accordance with the provisions of St. 1908, c. 305." The plaintiff contended that she had given such a notice and the defendant denied that he had received such a notice. The evidence upon this subject is described in the opinion. The judge refused to rule as matter of law that the defendant had received no notice in compliance with the statute. He submitted the question to the jury, who returned a verdict for the plaintiff in the sum of \$449.75. The defendant alleged exceptions, it being stipulated by the parties that, if the judge was wrong in submitting the case to the jury, judgment was to be entered for the defendant; otherwise, judgment was to be entered on the verdict.

G. Taintor, pro se.

W. H. Buie, (C. H. Morris with him,) for the plaintiff.

CARROLL, J. The plaintiff while a traveller upon a public street in Cambridge on February 8, 1911, was injured by snow and ice, from the defendant's occupied building, falling upon her. The question in the case is whether due and sufficient notice was given in accordance with St. 1908, c. 305. The plaintiff's attorney testified that on February 11, 1911, he gave notice to the defendant by mailing a letter, postage prepaid, to him at No. 53 State Street, Boston, Mass., stating the time, place and cause of the accident and claiming damages. On the envelope was a notice "return to Room 306, Kimball Building, Boston, Mass." The letter was deposited in the regular mail chute of the Kimball Building and was not returned to the attorney. The defendant denied that he received this letter and testified that he never received any communication from the plaintiff's attorney until he received a letter dated October 22, 1912. Under this statute, St. 1908, c. 305, the due service of a proper notice on the person sought to be charged, is a condition precedent to recovery. *Baird v. Baptist Society*, 208 Mass. 29. *Sweet v. Pecker*, 223 Mass. 286. Notice is to be given to the person obliged by law to keep the building in repair and "Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions."

In *Blanchard v. Ely*, 179 Mass. 586, which was a petition to enforce a lien under Pub. Sts. c. 192, § 24, requiring a demand for

payment to be "delivered to the debtor or left at his usual place of abode," it was held that demand in proper form, sent by mail, was a compliance with the statute. In that case the notice was received by the defendant at his residence, on the day after it was mailed, but the question decided was that a demand sent by mail was properly served. That case governs the case at bar and a notice sent by mail under St. 1908, c. 305, to the person obliged by law to keep the premises in repair was properly given. There was evidence that a notice in proper form was sent by mail to the defendant and was never returned. This was some evidence that the notice was sent and received. The depositing in the mail chute in the Kimball Building of a letter properly addressed, with the postage prepaid, is *prima facie* evidence that the defendant received it. It is a presumption of fact founded on the probability that the officers of the government will do their duty. *Swampscott Machine Co. v. Rice*, 159 Mass. 404. *Johnson v. Brown*, 154 Mass. 105, 106. *Huntley v. Whittier*, 105 Mass. 391. *Briggs v. Hervey*, 130 Mass. 186. As there was evidence that the notice was sent and received, the judge could not say as matter of law that it did not reach the defendant. Notwithstanding his testimony that he did not receive it, it was a question of fact for the jury. *Shea v. New York, New Haven, & Hartford Railroad*, 173 Mass. 177, 179. *Elliott v. Baker*, 194 Mass. 518.

The language of the statute which permits the leaving of the notice with the occupant of the premises, or if there is no occupant, posting the same in a conspicuous place thereon, provides a convenient way for the giving of the notice where the landlord is unknown or if for any other reason it is difficult to deliver the notice. This language does not imply that a proper notice sent by mail to the defendant is ineffectual. *Blanchard v. Ely, supra*.
Exceptions overruled.

MARGARET GUNNING vs. D. WEBSTER KING & others.

Suffolk. November 13, 1917. — January 5, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In leaving coal hole open, Res ipsa loquitur.

Where the iron cover of a coal hole in a sidewalk, that ordinarily fitted in a rabbet and was held in position by its own weight and also was held in place by a weight fastened by a heavy wire to a ring in the bottom of the cover, was found at half past three o'clock in the morning on the sidewalk eight or nine inches away from the hole with nothing attached to it and there was nothing to show when, by whom or for what purpose the cover was removed, a traveller who was injured by stepping into the hole at this time under these conditions, cannot maintain on these facts an action against the person in control of the building to which the coal hole appertained, because these facts are not evidence of negligence on his part.

The presence on a sidewalk of a coal hole cover eight or nine inches from the uncovered hole is not in itself evidence of negligence on the part of the person controlling the building served by the coal hole.

TORT against the lessees and the sublessees of the building numbered 272 on Franklin Street in Boston for personal injuries sustained at about half past three o'clock on the morning of June 28, 1907, by reason of stepping into an open coal hole in the sidewalk in front of that building when the plaintiff was walking down Franklin Street on her way to her work. Writ dated February 25, 1908.

In the Superior Court the case was tried before *King, J.* It was admitted that the coal hole and cover at the time of the plaintiff's injury were in the control of the sublessees. The defendants offered no evidence on the question of liability. At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the lessees and submitted the case to the jury as against the sublessees. The jury returned a verdict against those defendants in the sum of \$1,000; and at the request of those defendants the judge reported the case for determination by this court. If there was no evidence which justified the judge in submitting the case to the jury, judgment was to be entered for the defendants; otherwise, judgment was to be entered on the verdict.

W. U. Friend, for the defendant sublessees.

J. J. Walsh, (*J. F. Lynch* with him,) for the plaintiff.

CARROLL, J. The plaintiff was injured by stepping into a coal hole in the sidewalk in front of the premises 272 Franklin Street, Boston, about thirty minutes after three o'clock on the morning of June 28, 1907. The iron cover, about a foot in diameter, was found at the time of the accident, eight or nine inches away from the hole. The cover fitted in a rabbet and was held in position by its own weight. It also was fastened by a weight held in place by a heavy wire fastened to a ring in the bottom of the cover. There was evidence that this weight was attached to prevent "it from being lifted at night by any one trying to get in, rather than anything else." When the cover was found, nothing was attached to it.

While the cover was not on the hole, there is nothing to show when or by whom it was removed. It may have been removed by the direction of the defendants and it may have been removed without their knowledge and against their will; it may have been taken off only a moment before the plaintiff was injured and it may have been removed a much longer time; but as to these facts we are left in doubt. It is entirely a matter of conjecture when, by whom and for what purpose the cover was removed. The negligence of the defendants, if any, was in having the hole open, but there is no evidence to show that the cover was removed by them or that they knew of it. There is, therefore, no evidence of negligence and the burden resting upon the plaintiff to establish this proposition has not been maintained. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572. *Childs v. American Express Co.* 197 Mass. 337.

The fact that nothing was attached to the cover at the time of the plaintiff's injury does not tend to show neglect of the defendants. No inference of negligence on the defendants' part could be drawn from that fact. Nor does the doctrine of *res ipsa loquitur* apply. The presence of the cover on the sidewalk, eight or nine inches from the hole, is not evidence which, according to ordinary experience, warrants the inference that it was there because the defendants were careless. *Obertoni v. Boston & Maine Railroad*, 186 Mass. 481. *Wadsworth v. Boston Elevated Railway*, *supra*, and cases cited. *Deagle v. New York, New Haven, &*

Hartford Railroad, 217 Mass. 23. *Carney v. Boston Elevated Railway*, 212 Mass. 179.

According to the terms of the report judgment is to be entered for the defendants and it is

So ordered.

JOHN G. WELD vs. WINTHROP A. STILES.

Suffolk. November 16, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Implied in law. *Sale*, Rescission for failure of consideration.

In an action to recover \$275 paid by the plaintiff to the defendant for the chassis of a motor car that had been injured by fire, where there was evidence that the plaintiff had paid the price agreed upon and as between the parties had acquired title to the chassis but that the defendant refused to deliver it or to give a good title to it, it was *held* that the plaintiff was entitled to go to the jury.

CONTRACT for failure to deliver the chassis of a motor car or to return to the plaintiff \$275 paid by the plaintiff therefor. Writ in the Municipal Court of the City of Boston dated March 1, 1916.

The declaration was as follows:

"And the plaintiff says that on or about the 7th day of January, A. D., 1916, the defendant agreed with the plaintiff to sell and to deliver to him, the said plaintiff, a certain automobile chassis for the sum of Two Hundred Seventy-five Dollars (\$275), which sum of money the plaintiff paid to the defendant forthwith. That subsequently on or about the 1st day of February, A. D. 1916, the defendant refused to deliver to the plaintiff the said automobile chassis, although demand for the same was made by the plaintiff of the defendant. Neither has the defendant paid back to the plaintiff the sum of \$275 which was paid by the plaintiff to the defendant as aforesaid.

"Wherefore the plaintiff says that he is entitled to his damages from the defendant."

The defendant's answer was a general denial.

On removal to the Superior Court the case was tried before O'Connell, J. The evidence is described in the opinion. The bill

of exceptions, besides the statement of the evidence described in the opinion, contained the following statement:

"The plaintiff rested, and the defendant testified in his own behalf that on January 7, 1916, he owned this burned chassis, which he sold; that he bought it of the Liverpool and London and Globe Insurance Company and paid for it by his check; that the owner of the automobile originally, before it was burned, was a man named Connolly; that after it was burned he held it. He was ready to give it up. He did not refuse to give it up, not definitely. He wanted to show his power before he gave it up. He did not refuse absolutely to give it up. That was laying down there. Nobody had claimed it. The insurance company did not want it. They sold it to the defendant and the defendant sold it to the plaintiff."

The defendant made a motion in writing asking the judge "to direct a verdict for the defendant for the reason that upon the pleadings and the evidence the plaintiff was not entitled to recover." The judge denied the defendant's motion and refused to direct a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of \$287; and the defendant alleged exceptions.

C. W. Rowley, for the defendant.

W. F. Davis, Jr., for the plaintiff, submitted a brief.

CARROLL, J. The plaintiff bought from the defendant on January 7, 1916, a burned automobile, paying therefor the sum of \$275. He testified that it then became his property, and that the defendant was unable to make delivery of the machine. There was also evidence that the defendant said that, "on account of certain complications with the insurance company, this burned chassis at Newport he was absolutely unable to make delivery of, this automobile, or to give good title of the same to Mr. Weld." The defendant denied that he was unable to deliver the automobile. His contention was that it was to be taken by the plaintiff "just where it laid; that the defendant was under no obligation whatever to do any other thing" and "knew of no reason why Mr. Weld could not go down there and get it." The jury found for the plaintiff. The defendant moved in writing to have the judge direct a verdict in his favor, and to the denial of this motion by the judge the defendant excepted.

The declaration is for breach of an executory contract of sale. The trial proceeded on the ground of an actual sale. No question of pleading was raised and the motion of the defendant did not directly call the judge's attention to this point. In view of the evidence and the conduct of the parties, we treat the case as that of an actual sale. See *Lafrance v. Desautels*, 225 Mass. 324.

As there was evidence for the jury that the defendant refused to make delivery or to give good title to the property sold, although fully paid therefor, the judge could not grant the defendant's motion.

Exceptions overruled.

YETTE PEARL vs. G. FAUNCE WHITCOMB, administrator.

Suffolk. November 16, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Drain, Private. Municipal Corporations, Order to connect with sewer. Boston.

Where one of a number of landowners who had the right to use in common a private drain continued to use it for many years after all the others having the right had made connections with a public sewer and had ceased to use the private drain, this does not make the person who continued to exercise his right to use the drain liable for damage to property from an overflow of waste water from the drain, which was due wholly to the act of a third person who built a foundation wall across the drain and which was not due to any negligence on the part of the person who continued to use the drain.

It here was *said* that an order of the health department of Boston, addressed to a landowner who has been using a private drain, ordering him to make a connection with the public sewer in the adjoining street, does not require him to abandon the use of the private drain, where the order contains no prohibition of its use.

TORT originally against Emma C. Whitcomb of Boston, trustee under the will of Harlan P. Whitcomb of that city, who died on November 14, 1913, for damage done to a stock of boots and shoes belonging to the plaintiff by water which overflowed upon them in the basement occupied by the plaintiff in the building numbered 15 on Albany Street in Boston, the overflow being alleged to have been caused by the negligence of the defendant

in permitting a private drain in the rear of that building to become choked. Writ dated April 21, 1915.

On December 12, 1916, a suggestion of the death of Emma C. Whitcomb was filed, and an order of court was made admitting the administrator of her estate as the defendant.

In the Superior Court the case was tried before *Dana, J.* The evidence is described in the opinion. The judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the judge was wrong in ordering the verdict, judgment was to be entered for the plaintiff in the sum of \$3,000; otherwise, judgment was to be entered for the defendant on the verdict. A further stipulation in regard to the exclusion by the judge of the release referred to in the opinion has become immaterial.

J. B. Jacobs, for the plaintiff.

J. H. Devlin, Jr., for the defendant.

CARROLL, J. In January, 1914, the plaintiff occupied the basement of the building No. 15 Albany Street, Boston, and a quantity of shoes belonging to her were damaged by water overflowing from a private common drain in the rear of her tenement. At this time the real estate numbered 7 Albany Street was owned by the defendant's intestate, Emma C. Whitcomb, as trustee under the will of Harlan P. Whitcomb, who died November 14, 1913. The drain ran in the rear of both No. 7 and No. 15 Albany Street, in an alley or passageway extending to the premises No. 31 Albany Street, where it turned "at right angles in the rear of No. 31, and passing by No. 31 at the right, and entering the public sewer at the Kneeland Street end." There was evidence that the waste water coming from the defendant's building entered the drain and overflowed into the tenement of the plaintiff. There was no direct evidence that the property numbered 31 Albany Street was connected with this drain, and there was no evidence that it was connected with the Albany Street or Kneeland Street sewer, although there was evidence that an application had been made at one time by the person in possession of this property to enter the public street sewer, but the application was returned and the books of the city sewer department showed it was "not used." The records of that department "do not show any entrance by No. 31 anywhere." There was also testimony that in

1908 the owners of the buildings connected with the drain used in common by them were notified to enter the public sewer. With the exception of Mr. Whitcomb they all entered the sewer and ceased to use the drain. No such notice was at any time served on Emma C. Whitcomb.

There was evidence that "in the old part of the city of Boston, around this locality especially, there was hardly an estate that did not connect with the private drain in the rear passage as well as the sewer in the front street." The record does not show when the drain was built. One Braynard, who owned land on Albany Street, (how much does not appear, but it would seem that he was the owner of all the land having the right to discharge into the drain,) in conveying the land No. 7 Albany Street stated in his deed, "Two passageways have been laid out by me which with the drain running under said passageways into the common sewer in Albany Street are to be for the common use and benefit of the owners and occupants of the ten houses aforesaid, each owner respectively paying an equal proportion of the expense of keeping said passageways and drain in repair." "The Emergency Hospital stable which was formerly at No. 7 Albany Street," entered the public sewer in 1889.

The drain carried off the waste water from the defendant's property until January 24, 1914, when it was connected with the street sewer. There was evidence "that the foundation wall at No. 31 had cut the sewer [the common drain in the rear] right in half and they had built the other foundation wall and blocked it; cut it right off." The exact date when this was done did not appear, although there was some evidence that it was a "year or so previous." There was no evidence that the defendant's intestate or predecessors in title had notice or knowledge of the construction of this foundation wall, or of its interference with the drain.

The judge ordered a verdict for the defendant and reported the case.

The defendant, having the right to discharge the waste water from her building into the common drain, did not become liable to the plaintiff unless the plaintiff's property was injured through the defendant's neglect. See *Smith v. Lally*, 173 Mass. 365; *Hawkesworth v. Thompson*, 98 Mass. 77. It clearly appeared that

the overflow from the drain into the plaintiff's store was caused by the blocking up of the drain on the premises No. 31 Albany Street. This was testified to by the plaintiff's witnesses, and no other cause appeared for the obstruction. Neither the defendant's intestate nor her predecessor in title had anything to do with the building of the wall which caused the clogging of the drain. They had no knowledge that the foundation wall went through it, stopping the outlet to the Kneeland Street sewer, and there is no evidence to show they had any knowledge that the drain was out of repair or defective in any way, until notified of the damage to the plaintiff's stock of shoes.

The mere fact, that the other owners having the right to use the drain ceased to use it when they entered the common sewer, did not deprive them of their ownership in it and did not take from the proprietor of the defendant's estate the right to continue to discharge the waste water into it.

The order of the health department of Boston to enter the public sewer did not require an abandonment of the drain. There was no order demanding this to be done; in fact, the health officer testified "We never prohibited the use of the drain."

No acts were done by Whitcomb inconsistent with the continued existence of the drain and nothing was said or done by him indicating an intent to abandon or extinguish its use as a common drain, and there was no extinguishment or abandonment of the easement. There was no order of the board of health to remove the drain, or prohibiting its use as a nuisance under R. L. c. 75, §§ 66-69. One witness testified that after all the other parties "got out of this common drain," he (Mr. Whitcomb) then claimed he was the only person using the drain, and therefore he had "a good and particular drain;" that "A 'particular drain' is where a building has its own special drain leading into a sewer, one particular drain. 'Common drain' is where different parties enter into a drain, and then connect with the sewer, with the common drain." It did not appear at the time Mr. Whitcomb spoke of the common drain in the rear as being a "good and particular drain" he used the words in the sense in which they were defined by the witness. Even if the owner did so use these words and spoke of the drain as being a particular drain, as understood by the witness, this statement did not make the drain a particular one for his exclusive

use and deprive the others of the use of the easement. It continued to be a common drain under the agreement of the parties, and, although Whitcomb alone used it, he was using it under the right granted him. His trustee by reason of this statement cannot be held to the responsibility resting upon a landowner who, by an artificial structure, causes water or other substances to be discharged on the land of a neighbor, as to which see *Ball v. Nye*, 99 Mass. 582; *Shipley v. Fifty Associates*, 106 Mass. 194.

Under the conveyance from Braynard the defendant was not bound to make all the repairs in the drain, and, as no negligence on the part of the owner of the property No. 7 Albany Street is shown, the defendant is not liable. Since the plaintiff cannot recover from the defendant, it is unnecessary to consider the effect of the release given by the plaintiff to her landlord. According to the terms of the report judgment is to be entered on the verdict.

So ordered.

BOSTON, CAPE COD AND NEW YORK CANAL COMPANY *vs.*
FRANK H. HENSHAW.

SAME *vs.* EDWARD S. BERRY.
SAME *vs.* SALATHIEL H. PERRY.
SAME *vs.* FREDERIC RAYMOND.
SAME *vs.* PRESTON L. BLACKWELL, executor.
SAME *vs.* SARAH F. BUTLER, administratrix.
SAME *vs.* HIRAM L. PERRY, administrator.
SAME *vs.* MISSOURI H. STEVENS, administratrix.
SAME *vs.* BENJAMIN F. BERRY.
SAME *vs.* CHARLES F. BERRY.
SAME *vs.* WILLIAM B. TABER.
SAME *vs.* JOHN F. PERRY & others.

Barnstable. November 19, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Damages, For property taken or damaged under statutory authority. *Oyster Fishery*. *Boston, Cape Cod and New York Canal Company*. *Partnership*.

Under St. 1899, c. 448, § 16, providing that the Boston, Cape Cod and New York Canal Company should pay damages "In case of any injury to any fishery, including oyster fisheries, caused by said canal company by the deposit of ex-

cavated material, or in any other way, . . . to the owner or licensee of said fishery," such owner or licensee is entitled to damages, wherever his fishery which was injured was located, within or without the location of the canal, and whether the injury suffered was to oysters in the soil and the seed attached thereto or resulted in the permanent destruction of the fishery.

The owner or licensee of an oyster fishery injured by the Boston, Cape Cod and New York Canal Company in the construction of its canal can recover damages for oyster seed or oysters placed in the ground at a time subsequent to the date of the filing of the company's location in the registry of deeds for Barnstable County.

The damages for such injury should be determined as of the date when the injury is done. In this case the injury was two years and one month after the date of the filing of the company's location.

Whether the formation, by several persons holding separate licenses from a town for the planting, growing and digging of oysters, of a partnership whereby the partners carried on the business of oyster fishing under all the grants "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment of the licenses as, under R. L. c. 91, § 107, required the written consent of the selectmen of the town, so that under § 110 of that chapter, in default of such consent, the business might have been declared forfeited upon objection by the Commonwealth, was not decided in this case.

If the objection, that the grant of a license by the selectmen of a town for the planting, growing and digging of oysters, had become forfeited under R. L. c. 91, §§ 107, 110, because it had been assigned without the consent in writing of the selectmen, has not been raised and enforced by the Commonwealth, it cannot successfully be raised by the Boston, Cape Cod and New York Canal Company in a proceeding under St. 1899, c. 448, § 16, for the assessment of damages resulting to such a fishery by acts of the canal company in the construction of its canal.

TWELVE PETITIONS, filed in the Superior Court for the county of Barnstable on February 11, 1914, by the Boston, Cape Cod and New York Canal Company, hereinafter called the canal company, under St. 1899, c. 448, § 16, for the assessment by a jury of the damages to which the respective respondents are entitled by reason of injury caused by the petitioner in the construction of its canal to oyster fisheries where the respondents had been given licenses by the town of Bourne to plant, grow and dig oysters.

The respondents, under the circumstances described in the opinion, severally had filed petitions for the assessment of their damages with the commissioners on inland fisheries and game, who had made awards. These twelve petitions were filed because the canal company was dissatisfied with those awards.

In the Superior Court by agreement of the parties the petitions

were referred to three commissioners under a rule which provided that their reports should be final as to matters of fact, but subject to review by the court as to matters of law. The material portions of the reports of the commissioners are described in the opinion.

The cases were heard together in the Superior Court upon the reports of the commissioners by *Jenney, J.*, who refused to make certain rulings requested by the petitioner, which are described in the opinion, confirmed the reports of the commissioners and ordered judgments for the respective respondents in the following sums: Frank H. Henshaw, \$1314.59; Edward S. Berry, \$992.65; Salathiel H. Perry, \$2,171.09; Frederic Raymond, \$2,276.23; Preston L. Blackwell, executor, \$1,182.30; Sarah F. Butler, administratrix, \$9,315.80; Hiram L. Perry, administrator, \$1,057.48; Missouri H. Stevens, administratrix, \$3,519.08; Benjamin F. Berry, \$7,112.65; Charles F. Berry, \$7,847.32; William B. Taber, \$2,181.45; John F. Perry and others, \$3,190.73.

The petitioner alleged exceptions.

St. 1899, c. 448, § 16, is as follows: "In case of any injury to any fishery, including oyster fisheries, caused by said canal company by the deposit of excavated material, or in any other way, the canal company shall pay to the owner or licensee of said fishery, or to the towns of Sandwich or Bourne in case the fisheries destroyed or damaged are public fisheries, such damages as shall upon the application of either party be estimated by the commissioners on inland fisheries and game, in a manner similar, so far as may be, to that provided in laying out highways, and with a right of appeal to a jury by proceedings similar to those provided for in section five of this act."

F. B. Greenhalge, (*S. H. Pillsbury* with him,) for the petitioner.

E. S. Ellis, for the respondents in the first seven cases.

C. C. Paine, for the respondents in the last five cases.

CARROLL, J. The selectmen of Bourne granted to the several respondents or to their assignors, under R. L. c. 91, § 104, licenses to plant, grow and dig oysters in the town of Bourne. The canal company filed its location in the registry of deeds for the county of Barnstable on July 8, 1907, and the dredging of its canal was begun on August 8, 1909. These proceedings under St. 1899, c. 448, § 16, are for the assessment of damages to the respondents' oyster

fisheries alleged to have been caused by the construction of the petitioner's canal. The cases will be considered together.

In the Superior Court, by agreement of the parties, the cases were referred to three commissioners under a rule providing that their reports should be final on the facts. At the hearing on the confirmation of the reports, the petitioner requested the court to rule in each case:

"1. That upon the findings of the commissioners the respondent was not entitled to recover and that judgment should be entered in favor of the petitioner;

"2. That, if the respondent was entitled to recover at all, the measure of recovery was limited to the oysters in the soil and the spat or oyster seed attached thereto and that no damages should in any event, be allowed on account of impairment in the value of the grants."

These requests for rulings were refused and the petitioner excepted. The judge ordered, subject to the petitioner's exceptions, that the reports of the commissioners be confirmed and judgment entered for the respondents.

1. The St. 1899, c. 448, § 16, provides that the canal company shall pay damages "In case of any injury to any fishery, including oyster fisheries, caused by said canal company by the deposit of excavated material, or in any other way, . . . to the owner, or licensee of said fishery." Under § 24, provision is made for the recovery of damages where lands are taken by condemnation for the location of said canal. The petitioner contends that the respondents are not entitled to damages for the impairment in value of any license applicable to flats within the location of the canal. No land of the respondent was taken and no damages are asked for on account of the taking of land under § 24. The damages recovered were for injuries to the respondents' oyster fisheries; some of which, according to the commissioners' findings, were within, and some outside, the location of the canal. (In using the word "location" the commissioners probably had in mind the approaches of the canal that extended seaward from high water mark.) Section 16 was intended to apply where these oyster fisheries were injured in the authorized construction and completion of the canal as a navigable waterway, either by the "deposit of excavated material, or in any other way," although the

work was done in a proper manner and there was no negligence of the petitioner. This section was not limited to the fisheries outside the canal approaches: it included all such property within the location (using the word in the sense it was used by the commissioners) as well as property beyond these approaches, if injured in any way by the petitioner's operations in the construction of the canal, — whether the injury was to oysters in the soil and the seed attached thereto, or resulted in the permanent destruction of the respondents' grants. The words "in any other way" were used in the statute in a comprehensive sense. We have no doubt they were intended to apply where the fisheries were destroyed or injured in any way by any of the petitioner's operations, wherever located. The licenses granted by the selectmen to plant, dig and grow oysters upon the flats in the tide waters of Buzzards Bay within the limits of the town of Bourne for the term of ten years, were valuable privileges: they were property rights, and it was the intention of the Legislature that the owners thereof should be compensated in damages, if they were deprived of their property or it was in any manner taken away or destroyed in the performance of this work. See *Earle v. Commonwealth*, 180 Mass. 579, and *Allen v. Commonwealth*, 188 Mass. 59, where under the metropolitan water supply act, St. 1895, c. 488, § 14, the practice of a physician and the business of a farmer decreased in value by carrying out the act, and the petitioners were awarded compensation. As stated in *Keene v. Gifford*, 158 Mass. 120, at page 122: "The exclusive occupation of the territory for a considerable time was originally essential to the profit of the undertaking, and is secured by making the license for so long a term as twenty (now ten) years, and by giving during the term the exclusive use of the territory." The Legislature did not intend to compensate merely the owners of fisheries who were beyond the approaches of the canal, whose oysters or grants were injured by sediment or excavated matter or from other causes, and leave without compensation the owners of fisheries who were within the approaches of the canal, or whose grants have "been dug over entirely and some in part," and rendered entirely useless.

2. The further contention of the petitioner is that no damages should be allowed for oyster seed or oysters in the ground unless placed there before July 8, 1907, — the date of the filing of the

respondent's location in the registry of deeds for Barnstable County. It was decided in *Taylor v. Boston, Cape Cod & New York Canal Co.* 224 Mass. 307, that until the termination of the license of the grower, the shell fish remained his property and he could recover damages therefor under St. 1899, c. 448, § 16. While the landowner must petition for damages within six months after the filing of the location, no such provision is contained in § 16. The owners of oyster fisheries could not petition for damages until the actual damage was done. The grower was not required to anticipate damages to his property from the filing of the location, and should be permitted to recover for the value of the oysters and the seed in the soil, even if placed there subsequent to July 8, 1907.

3. What we have said disposes of the petitioner's claim that damages for the injury to the respondents' grants should not be determined as of August 8, 1909. No damage was done to these grants until that time. The commissioners rightly considered the value of the property at the time it was injured.

4. In the case of John F. Perry and others the respondents were inhabitants of the town of Bourne. John F. Perry was granted licenses numbered thirty-four, thirty-five, and thirty-six, Wallace J. Perry was granted licenses numbered thirty-nine and forty-one, and Harry E. Perry was granted licenses numbered twenty-eight and forty-three, to plant, dig and grow oysters in Bourne Neck flats. They carried on the culture of oysters on these grants as partners. The petitioner argues that these licenses are void because of the formation of the partnership which involved the transfer of an interest in the enterprise which amounts to a partial assignment, that under R. L. c. 91, § 107, no assignment of such a license shall be made without the written consent of the selectmen, and the licensee who violates the provisions of the statute relating to the growing of oysters shall forfeit his license. R. L. c. 91, § 110. Whether the formation of a partnership whereby the partners carried on the business "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment as required the written consent of the selectmen, or that the failure to obtain this consent was a violation of the statute and worked a forfeiture of the licenses, are questions which we do not decide. Even if we assume in favor

of the petitioner that the respondents' acts were contrary to the statute, the licenses granted to them cannot be forfeited at the request of a stranger to the grant, in a collateral proceeding. And it cannot be contended successfully in such a case that the licenses have been forfeited. The privilege of carrying on the business of growing oysters was granted to the respondents under an act of the Legislature, and until objection is made by the grantor and the forfeiture insisted on by the Commonwealth, the petitioner cannot rely on the alleged violation of the statute as an excuse for refusing compensation for the property injured. See in this connection *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *New York Indians v. United States*, 170 U. S. 1, 24, 25; *Kennebec Water District v. Waterville*, 97 Maine, 185, 210.

In the case where the original respondents are deceased, we understand that no question is now raised that the administrator and executors properly were permitted to prosecute the petition. *Webster v. Lowell*, 139 Mass. 172.

Exceptions overruled.

DIKRAM SERABIAN vs. ARAM TATIAN.

Suffolk. November 21, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practices, Civil, Waiver of defence, Prematurity of action. *Waiver*.

Where, at the trial in the Municipal Court of the City of Boston of an action of contract wherein the declaration was "for money paid for the use of and on and for the account of the defendant," there was evidence that the money was paid by the plaintiff at the defendant's request and the defendant filed several requests for rulings, none of which called attention to the fact that the declaration did not allege that the money was paid at the defendant's request, and the judge found for the plaintiff and the Appellate Division dismissed a report of the case made by the trial judge at the defendant's request and the defendant appealed, it is not open to the defendant to contend in this court that the declaration was bad, because there was no allegation that the money was paid at the defendant's request.

At the trial of the above described action brought on a June 7, it appeared that at the defendant's request the plaintiff had given to him his promissory note with the agreement that the defendant would repay him, that the defendant had negotiated the note, and that the plaintiff had been required to pay the note

to the indorsee. The record showed that some payments by the plaintiff on the note were made a year and ten months before the action was begun, but that the full payment of the note was not completed until six days after the date of the writ. The defendant did not bring to the attention of the trial judge that the final payment was made after the date of the writ and asked for no rulings to the effect that the action was brought prematurely. *Held*, that the defendant could not rely on such a defence in this court, and must be taken to have waived it.

CONTRACT, the declaration, as amended, being in three counts. The first count was for \$475 and interest, for money lent. The second count was for the same sum, for money paid and expended to the account of the defendant. The third count was for \$521.86 and interest from June 11, 1916, "for money paid for the use of and on and for the account of the defendant." Writ in the Municipal Court of the City of Boston dated June 7, 1916.

After the trial in the Municipal Court, the judge ruled that the plaintiff could not recover on the first count. He found for the plaintiff in the sum of \$521.86 and interest from June 11, 1916, and at the request of the defendant reported the case to the Appellate Division. The Appellate Division dismissed the report, and the defendant appealed.

The case was submitted on briefs.

J. E. Kelley & J. K. Tertzag, for the defendant.

T. J. Casey, for the plaintiff.

CARROLL, J. This is an action of contract with the declaration in three counts. The judge found for the plaintiff; as there was evidence to support the finding we cannot review his conclusion of fact. *Seager v. Drayton*, 217 Mass. 571.

Under the third count, there was evidence that the money was paid at the defendant's request. The defendant now contends that the declaration for money paid for the use of and on the account of the defendant, is bad, because it contains no statement that the money was paid and expended at the defendant's request. Although the defendant filed several prayers for rulings, in none of them was the attention of the court called to this question. And no objection appears to have been taken to the form of this count. The point now argued is not open to the defendant. Having failed to call the trial court's attention to the matter he must be deemed to have waived this defence. *Harris v. North American Ins. Co.* 190 Mass. 361, 373.

There was evidence that the plaintiff gave his promissory note for \$475 to the defendant, with the understanding that the defendant would repay him; that the defendant failed to carry out the agreement; and that the plaintiff paid the note to the indorsee. The writ is dated June 7, 1916. It is the contention of the defendant that the action was brought prematurely because no payment was made by the plaintiff until June 16, 1916. The record, however, shows that the final payment of \$117.69 was made on June 13, 1916, and the other payments were made before that time, beginning as early as August, 1914. Even if there were merit in this contention, the defendant cannot now rely upon it, as the question was not brought to the attention of the court, and no ruling was asked upon it. *Harris v. North American Ins. Co. supra. Lyon v. Prouty*, 154 Mass. 488.

We have examined all the defendant's exceptions and find no error of law in the conduct of the trial.

Order dismissing report affirmed.

FRANK S. MCALLISTER'S CASE.

Suffolk. November 21, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act. Agency, Existence of relation.

A journeyman paper hanger was hired by the foreman of the wall paper department of a corporation conducting a department store, who gave the journeyman his orders and instructions and whenever wall papering was required directed him to go to the purchaser's residence and hang the paper and also approved his bills. The name of the journeyman did not appear on the corporation's pay list of employees, because he was paid by the roll at a varying rate with the amount of his expenditures for car fares and paste and received a check weekly for the amount due him. Upon a claim by him under the workmen's compensation act for compensation for an injury sustained in the course of his work by a fall from a step-ladder, he testified that while at work "he was his own boss," but the other evidence showed that in case of unperformed or imperfect work by him the corporation would be liable to the purchaser and that the power to direct what should be done in satisfaction of the purchaser's contract was in the corporation, whose orders given through the foreman the journeyman uniformly obeyed and executed. *Held*, that a finding was war-

ranted that the journeyman at the time of his injury was in the employ of the corporation and was not an independent contractor within the meaning of St. 1911, c. 751, Part III, § 17.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding to Frank S. McAllister of Boston, who was alleged to be an employee of the Jordan Marsh Company, a corporation, compensation for an injury sustained by him on September 20, 1916, arising out of and in the course of his employment.

The case was heard by *Brown, J.* The evidence reported by the arbitration committee and the testimony of the alleged employee before the Industrial Accident Board are described in the opinion.

The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

E. C. Stone, for the insurer.

F. W. Mansfield & E. R. Mansfield, for the employee.

BRALEY, J. The injury complained of was caused by a fall from a step-ladder while the claimant was at work in the store of Jordan Marsh Company, a subscriber, hanging paper by direction of the foreman. The insurer contends that the claimant was an independent contractor within the meaning of St. 1911, c. 751, Part III, § 17, which confers on the employees of a contractor who has engaged "to do such subscriber's work," the same right to compensation as if they had been immediately employed by the subscriber, but makes no provision for the contractor where he performs the work himself. The question for decision therefore is whether at the time of the accident the claimant was an employee of the company. The contract of employment not having been reduced to writing, its terms are to be ascertained from the evidence reported by the arbitration committee, and the "cross-examination of the alleged employee in regard to work and relation to the alleged employer," which was introduced at the hearing on review. *Carnig v. Carr*, 167 Mass. 544. It appears that the claimant, a journeyman paper hanger, was hired by the foreman of the company's wall paper department, and whenever such work was required by a purchaser the foreman who "gave the claimant all his orders and instructions" and approved his bills, directed him to go to the

purchaser's residence and hang the paper. But his name did not appear on the company's pay-roll of employees, as he was paid by the roll at a varying price, with all expenditures for car fares and pasie, and received weekly by mail a check for the amount. The terms and mode of payment however are not the decisive test. *Morgan v. Smith*, 159 Mass. 570, 574. It is whether the employer retained authority to direct and control the work, or had given it to the claimant. *Forsyth v. Hooper*, 11 Allen, 419, 421, 422.

And, although the claimant testified that while at work "he was his own boss," his services manifestly formed part of the company's regular business conducted by itself, and the placing of the paper by his skill and labor enured to its benefit. The time and place of labor were not constant but were determined by the employer as required by the demands of customers. If while the work was in process dissatisfaction arose, or damage was being done, the customer would be obliged to resort not to him but to the company for further directions or redress. It cannot be said on the record as matter of law, that the Industrial Accident Board was not warranted in finding that the parties never intended the claimant should have the absolute right to hang the paper when and as he pleased regardless of any supervision by the company, which alone would be responsible in damages for unperformed or imperfect work; and that whenever and wherever necessary the power to direct what should be done in satisfaction of the purchaser's contract, the parties contemplated and understood, was lodged with, or retained by the company, whose orders given through the foreman the claimant uniformly obeyed and executed. *Coughlan v. Cambridge*, 166 Mass. 268, 277. *Samuelian v. American Tool & Machine Co.* 168 Mass. 12. *Driscoll v. Towle*, 181 Mass. 416, 419. *Wakefield v. Boston Coal Co.* 197 Mass. 527. *Bowie v. Coffin Valve Co.* 200 Mass. 571, 577, 578. *Clancy's Case*, 228 Mass. 316.

The decree awarding compensation should be affirmed. St. 1911, c. 751, Part II, § 1.

So ordered.

CHARLES E. LEAVITT vs. GLADYS E. LEAVITT.

Norfolk. November 22, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Marriage and Divorce, Connivance. Evidence, Presumptions and burden of proof.

The connivance which will constitute a bar to a libel for divorce need not be express connivance. It may be established by evidence which shows either active or passive consent on the part of the libellant to adulterous acts of the libellee.

A judge who heard a libel for divorce brought by a husband and charging adultery found, on evidence warranting the finding, that the libellant entertained the co-respondent at his home one evening and night and, knowing that the alleged co-respondent had purchased and had a pint of whiskey, left him with his wife while he spent the evening elsewhere; that, returning, he from outside his house saw the pair in familiar attitudes and, through a window, heard them agree to a clandestine meeting in a neighboring city the following day when there would be an opportunity for an adulterous act; that the libellant then entered the house, saw evidences of the use of the whiskey by both of the pair, treated them pleasantly and slept that night with the alleged co-respondent; that the next morning the libellee asked him for money for a dress, that he told her he had not enough for that, that she asked him for \$5 for a skirt which he gave her; that she left for the city by an early train; that he told the alleged co-respondent that he should spend the day in the neighborhood; that the co-respondent left him and thereupon the libellant went to the city and, by use of detectives, caught the libellee and the alleged co-respondent together under circumstances which would warrant a finding of adultery. From such finding the judge drew the inference that the libellant, deliberately throwing the libellee off her guard, gave her money intending to aid her in carrying out her purpose in going on her adulterous enterprise, and ruled as a matter of law that the libellant was guilty of connivance and dismissed the libel. *Held*, that the judge's inference of fact and ruling of law were warranted.

LIBEL FOR DIVORCE, filed on October 23, 1916, and afterwards amended, charging adultery.

The libel was heard by *Callahan, J.* On the libellant's direct testimony alone the judge found the following facts: "I find that the libellant, a ship's draftsman, employed at the Brooklyn Navy Yard, invited the alleged co-respondent, a friend and fellow draftsman employed at the same yard, to accompany him on a visit to the libellant's family at Weymouth; that they left Brooklyn on the night of October 18, 1916, and arrived in Boston early the

following morning; that the alleged co-respondent with the knowledge of the libellant, purchased a pint of whiskey; that they arrived at the libellant's home in Weymouth about half past one o'clock in the afternoon and that the libellant introduced the alleged co-respondent to his wife, they never having met before; that, during the afternoon, the libellant and the alleged co-respondent worked on the assembling of a dismantled motor cycle, and that while they were so engaged the libellee frequently entered the room and conversed with them; that after all the parties had had supper together the libellant said that he desired to attend a lodge meeting in order to meet his acquaintances, and asked the alleged co-respondent if he was willing to remain at the house a couple of hours or so, and that the alleged co-respondent said he was very willing; that he left his home about a quarter before eight o'clock in the evening and returned about a quarter before eleven o'clock; that, as he turned up the path leading to his home, he saw through a crack in the curtain the alleged co-respondent sitting on a rocking chair and the libellee standing near him with one hand resting on his shoulder and the other smoothing his hair; that in order to hear their conversation he walked to another window and heard his wife say that she wanted a new dress, that she would meet the alleged co-respondent at track 26 in the South Station in Boston at half past twelve o'clock the following day; that he heard the alleged co-respondent say that he did not have much money with him, but he guessed he might have enough for a good time; that the libellee replied that she guessed he was 'all to the good in other respects;' that she talked of his beautiful hair and said they would better be careful as the libellant might return home any minute; that thereupon the libellant entered the house and saw a pint whiskey bottle and two glasses standing on the table between them; that three quarters of the contents of the bottle had been consumed; that the alleged co-respondent showed the effects of the liquor, but that his wife showed no such effects, although liquor could be smelled upon her breath; that he engaged in pleasant conversation with them for fifteen minutes and made no reference to what he had heard or seen; that he slept with the alleged co-respondent that night, both occupying the same bed; that the next morning the libellee told him that she was going to Boston

and asked for \$15 with which to purchase a dress; that he told her that he could not afford to give her the sum mentioned, but did give her \$5 for the purchase of a skirt; that, subsequently, at Boston she did purchase a skirt for \$2.98; that she left for Boston on an early train, leaving the libellant and the alleged co-respondent at the house; that the alleged co-respondent told the libellant that he was going over to the Fore River shipyard, and that he expected to be in Boston in time to meet a cousin at half past twelve o'clock; that the libellant informed him that he would spend the day locking up, or otherwise attending to, certain summer cottages at Weymouth; that immediately after the alleged co-respondent's departure the libellant hastened to Boston and engaged private detectives for the purpose of detecting the libellee and the alleged co-respondent in the act of committing the crime planned the night before; that the libellant and the detectives saw the libellee and the alleged co-respondent meet at the South Station and followed them to a hotel where after repeated knockings, they were admitted to a room occupied by the alleged co-respondent and the libellee and found them in such circumstances as would justify me in finding, if the libellant's testimony remained uncontradicted, that an act of adultery had been committed.

"I further find that the libellant, after hearing the libellee and the alleged co-respondent make their lustful plans and, after seeing evidences of excessive drinking on the part of his friend and guest in the company with his wife, slept with the alleged co-respondent for the purpose of freeing the minds of the guilty couple of any fear of suspicion on the part of the libellant.

"I further find that in giving her money for the purchase of the skirt he intended to aid her in carrying out her purpose to go to Boston upon her adulterous enterprise.

"I further find that when he informed the alleged co-respondent that he intended to remain at Weymouth he made a false statement of his intention for the purpose of inducing the alleged co-respondent and the libellee to believe that they were free from any danger of encountering the libellant in Boston."

At the conclusion of the libellant's direct testimony and without any other evidence, the judge ruled as a matter of law upon the facts found by him from the libellant's testimony, the inferences therefrom and the appearance of the libellant that such facts

constituted connivance and ordered that the libel be dismissed. The libellant alleged exceptions.

W. W. Kennard, (*W. J. Drew* with him,) for the libellant.

T. F. McAnarney, for the libellee.

BRALEY, J. The exceptions state, that the "court made no finding upon the charges of adultery, it being understood that the only issue passed on was that of connivance," and having found that connivance had been proved the presiding judge ordered the libel dismissed. The evidence is reported; but we cannot reverse his findings of fact. *Morrison v. Morrison*, 136 Mass. 310. The question accordingly is whether the evidence warranted the finding.

It is not contended that express connivance had been shown; but this is not necessary. It may be established by conduct which not only causes the adulterous act, but shows consent thereto actively or passively of the libellant. *Robbins v. Robbins*, 140 Mass. 528, 531. The right to a divorce is barred because, the marital wrong complained of having been consented to, no injury has been suffered. *Pierce v. Pierce*, 3 Pick. 299. *Wilson v. Wilson*, 154 Mass. 194. *Noyes v. Noyes*, 194 Mass. 20. *Ross v. Ross*, L. R. 1 P. & D. 734.

The only evidence introduced was that of the libellant. It unquestionably shows undue and censurable familiarity between the libellee and the co-respondent at the matrimonial home, with an arrangement between them for a meeting the next day in a neighboring city, where an opportunity would be afforded for the act charged in the libel. But, even if as further appears the libellant was fully informed as to his wife's adulterous disposition, and did not remonstrate or warn her of her peril and of the consequences which might follow, because he hoped she might go far enough to enable him to obtain a divorce, his conduct did not amount to connivance. *Wilson v. Wilson*, 154 Mass. 194. The libellant however also testified, that on the morning of the day of the appointment, the libellee said that she was going to the city and asked for money with which to purchase a dress. But, being unable to advance the amount required, he gave her a less sum to buy a skirt. The journey was made, and, although a skirt was purchased at a price leaving an appreciable balance of the money given to her, the evidence, if believed, showed the act

charged in the libel to have been committed. The real, not the ostensible purpose of the libellant in advancing the money was a question of fact, and the judge under the circumstances was justified in finding, "that in giving her money for the purchase of the skirt he intended to aid her in carrying out her purpose to go . . . upon her adulterous enterprise."

The intent and willingness of mind of the libellant to have his wife transgress having been found, the ruling that as matter of law the libel could not be maintained was correct. *Cairns v. Cairns*, 109 Mass. 408. *Morrison v. Morrison*, 136 Mass. 310.

Exceptions overruled.



PETER J. CASEY vs. JUSTICE OF THE SUPERIOR COURT.

Suffolk. November 23, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Mandamus. Constitutional Law, Trial by jury. Jury and Jurors. Attorney at Law. Practice, Civil.

Neither by constitutional provision nor by statute is a petitioner for a writ of mandamus given a right of trial by jury of issues of fact raised by the pleadings. It is within the discretionary power of a justice of this court in the matter of a petition for a writ of mandamus to allow a motion of the respondent to amend his answer.

While it would be proper, upon the hearing of a petition for a writ of mandamus commanding a justice of the Superior Court to recognize the petitioner as an attorney at law and counsel for the plaintiff in a suit pending for hearing before him, for the Attorney General to appear for the respondent, he is not required so to act, and it is proper for the respondent to be represented by members of the bar of the Commonwealth who hold no other official position in the Commonwealth.

It being a criminal offence for a disbarred attorney to continue to practice law, a petition by him for a writ of mandamus to compel a justice of the Superior Court to recognize him as an attorney at law and as counsel for the plaintiff in a suit in equity called for hearing before the justice must be denied.

PETITION, filed on January 18, 1916, for a writ of mandamus commanding a justice of the Superior Court to allow the petitioner to appear and act as counsel and as an attorney at law for the plaintiff in a suit in equity, Magann and the Brookline Taxi Company against the Locomobile Company of America,

then pending in the Superior Court, and on January 18, 1916, called for hearing before the respondent.

The case was heard by *Crosby, J.* The pleadings, material facts and the course of the hearing are described in the opinion. The single justice denied the petition on January 26, 1916, and on February 10, 1916, the petitioner filed the motion there mentioned to strike from the record the amended answer of the respondent and the appearance of his attorneys. This motion was denied on April 6, 1916.

The petitioner alleged exceptions and also filed a claim of appeal.

P. J. Casey, pro se.

G. D. Burrage, (W. G. Thompson with him,) for the respondent.

BRALEY, J. This is a petition for a writ of mandamus commanding the respondent, a justice of the Superior Court, to allow the petitioner to appear and act as counsel and as an attorney at law for the plaintiffs in a suit in equity pending in that court.

The answer not having admitted the allegations of the petitioner's employment, it was incumbent on him to offer some evidence that he had been retained. But the exceptions state that "the petitioner offered no oral evidence." Nor does it appear that any statements were made from which, if treated as evidence by consent of parties, this essential relation could be found. But, as the case seems to have been tried before the single justice and was argued before us on the assumption that the relation of attorney and client existed, we treat the questions raised in the order shown by the record.

The request or demand for a trial by jury was denied rightly. "A petition for a writ of mandamus may be presented to a justice of the Supreme Judicial Court and he may, after notice, hear and determine the same." R. L. c. 192, § 5. The issuing of the writ is discretionary. *McCarthy v. Street Commissioners*, 188 Mass. 338, 340. A petition for mandamus was not triable to a jury when our Constitution was adopted and the petitioner does not present a case within art. 15 of the Declaration of Rights. *Attorney General v. Sullivan*, 163 Mass. 446.

It also is plain that the petitioner in the trial court could have saved all his rights by exceptions duly taken to the refusal of the respondent to recognize him as an attorney at law entitled to practice in our courts.

Nor is any error of law shown in the allowance of the respondent's motion to amend his answer, or in the refusal of the petitioner's motion to vacate the order and strike from the record the present answers and appearances of attorneys, even if an order previously had been entered denying the petition. Allowance of the respondent's motion was in the discretion of the single justice. And while it would have been proper for the Attorney General to have appeared for the respondent, he is not required to act, and the procedure followed is sanctioned by our decisions for over a century. *Commonwealth v. Justices of the Court of Sessions*, 5 Mass. 435. *Van Ingen v. Justices of the Municipal Court*, 166 Mass. 128. *Crocker v. Justices of the Superior Court*, 208 Mass. 162. *Ashley v. Justices of the Superior Court*, 228 Mass. 63.

The petitioner did not traverse, and, having joined issue, all the material facts alleged in the answer are to be taken as true. R. L. c. 192, § 5. *Hill v. Mayor of Boston*, 193 Mass. 569, 575. It is certain from the amended answer and from the record for which the single justice sent and which he had before him without any exception being taken, that at the time when the petitioner was denied recognition he had been disbarred and that the judgment of disbarment had not been modified nor annulled. *Boston Bar Association v. Casey*, 196 Mass. 100. It follows under R. L. c. 165, § 45, as amended by St. 1914, c. 432, making it a criminal offence for a disbarred attorney to continue thereafter to practice law, that the petition cannot be maintained. *Boston Bar Association v. Casey*, 227 Mass. 46.

Exceptions overruled.
Appeal dismissed.

ALESSANDRO MELCHIONDA vs. AMERICAN LOCOMOTIVE COMPANY.

Suffolk. December 4, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Existence of relation.

In an action against a machine company for injury to the plaintiff's horse and wagon from being run into by a motor truck belonging to the defendant by reason of the negligence of the driver of the truck, the defendant denied that the driver of the truck was its servant. It appeared that the driver was paid

by a milk company that had hired the motor truck from the defendant while one of its own motor trucks was being repaired by the defendant, that when the truck was hired the defendant's manager told an agent of the milk company, who had asked for a truck and driver, that he had no driver to send and that, if the agent of the milk company wanted the truck, he would have to put on his own driver, and the agent of the milk company testified that then "I told him that, if I put on my driver, he would have to be responsible for it," and "I don't think he made any reply." At the time of the accident the motor truck was being used to transport milk for the milk company. *Held*, that there was no evidence that the driver of the motor truck was the servant of the defendant, and that the plaintiff had no right to go to the jury; that, even if the silence of the defendant's manager was evidence of an implied assent to the proposition made to him, this was not evidence that the driver was the servant of the defendant, which never had hired him.

TORT for damage to the plaintiff's horse and pedler's cart and to the fruit contained in the cart from being run into on the morning of August 5, 1913, on Rutherford Avenue in the part of Boston called Charlestown by a motor truck belonging to the defendant by reason of the negligence of the driver of the truck alleged to have been the servant of the defendant.

In the Superior Court the case was tried before *White, J.* The plaintiff testified that, as he was driving carefully along Rutherford Avenue, the defendant's motor truck, coming from the opposite direction, suddenly swerved over to its left hand side of the road, and the rear wheel of the truck struck and ran over the left forward hoof of the plaintiff's horse.

One Worcester, the operator of the truck, called as a witness by the plaintiff, testified that he had been employed by H. P. Hood and Sons as chauffeur for about fourteen months before the accident; that two or three days before the accident he was told by one Farnsworth, the transportation manager for H. P. Hood and Sons, to take this truck and convey milk daily to Forest Hills from Charlestown; that the truck was owned by the defendant and was used by H. P. Hood and Sons, while its own truck was being repaired by the defendant; that he saw no one representing the defendant during this time and received no orders from anyone in regard to the truck or its use, except that Farnsworth told him to take it and drive it to Forest Hills; that on the morning of the accident he was carrying cans of milk to Forest Hills and that as he was passing a team the plaintiff suddenly turned his horse toward the truck, causing the accident.

It was admitted by the plaintiff "that the operator of the truck

was paid his wages for this period by H. P. Hood and Sons, the same as formerly."

One Farnsworth, called as a witness by the plaintiff, testified that he was transportation manager for H. P. Hood and Sons during the time in question; that the Hood Company were having a truck repaired and they hired this truck from the defendant for \$10 a day, which was a low figure, but that the Hood Company had bought several trucks from the defendant about that time and were doing a good deal of business with the defendant. He also testified that two or three days before the accident he called up one Gallagher, the manager of the service department of the defendant, and told him that "our No. 3 truck needed repairs and for him to let us have a car and driver to take its place, which he agreed to do," that Gallagher did not furnish a driver for the truck and, when no driver appeared, he, Farnsworth, telephoned to Gallagher again, the morning the truck was due, and Gallagher "told me that he had no driver to send; that if I wanted the truck, I would have to put on my driver. . . . I told him that, if I put on my driver, he would have to be responsible for it." When asked what reply Gallagher made to this statement, the witness Farnsworth said, "I don't think he made any reply." Farnsworth then sent a man to the defendant's place and got the truck.

Gallagher, called as a witness by the plaintiff, testified, that he was service manager of the defendant at the time in question and had authority to rent motor vehicles belonging to the defendant; and that he had no recollection of any such conversation as testified to by Farnsworth.

At the close of the evidence the defendant asked the judge to order a verdict for the defendant. This the judge refused to do and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$350. The defendant alleged exceptions.

L. C. Doyle, (W. I. Badger, Jr., with him,) for the defendant.

H. S. Avery, for the plaintiff.

BRALEY, J. The defendant is not responsible in damages because it owned the motor truck which through the carelessness of the driver came into collision with the plaintiff's team while both were travellers upon a public way. The plaintiff must go further and offer evidence from which it could be found that the driver was the defendant's servant. *Trombley v.*

Stevens-Duryea Co. 206 Mass. 516. *Marsal v. Hickey*, 225 Mass. 170.

It is plain from the uncontroverted evidence that while originally the defendant let the truck for hire, which included the services of a driver as in *Shepard v. Jacobs*, 204 Mass. 110, 112, it was operated at the time of the accident by an employee of the bailee, who is not shown to have had any knowledge of the conversation subsequent to the contract between the manager of his employer and the defendant's manager, on which the plaintiff relies as sufficient to warrant the jury in finding liability. While the jury doubtless could say that upon the answer to the inquiry why a driver had not been sent, "that he had no driver to send; that if I wanted the truck, I would have to put on my driver," the response was "that, if I put on my driver, he would have to be responsible for it," and that without further colloquy the truck was accepted, and used as previously described, the silence of the defendant, even if found to be an implied assent to the terms proposed, was insufficient to make the employee involuntarily the servant of the defendant with whom he never had sustained any contractual relations. *Morgan v. Smith*, 159 Mass. 570. *Samuelian v. American Tool & Machine Co.* 168 Mass. 12. *Driscoll v. Towle*, 181 Mass. 416. *Clancy's Case*, 228 Mass. 316. It follows that, the plaintiff not having been injured by any negligent act of the defendant, the exceptions must be sustained, and judgment entered for it under St. 1909, c. 236, § 1.

So ordered.

LOUIS ROSENBERG vs. NATHAN DROOKER & another.

Suffolk. December 5, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Frauds, Statute of. Practice, Civil, Conduct of trial: requests for instructions; Action prematurely brought, Waiver of defence. *Waiver.*

Where an owner of real estate, who has made a contract to sell the real estate, orally agrees with the owner of a second mortgage upon the property that, if the owner of the real estate will discharge his contract of sale and will not appear at a sale in foreclosure of the second mortgage, which is about to take place,

and will not bid in the property, the second mortgagee will sell the property to the purchaser to whom the owner has agreed to sell it and will pay the owner a certain amount of money, if the owner thereupon discharges his contract of sale and refrains from attending the foreclosure sale and the real estate is sold by the mortgagee, the mortgagee's oral agreement to pay a sum of money is not within the statute of frauds.

Where, at the trial of an action by the owner against the mortgagee for failure to pay to the plaintiff the sum of money in accordance with the oral agreement above described, there is evidence tending to show that all that the plaintiff agreed to do was to discharge his rights under his contract of sale and that he did not agree to procure a release from the purchaser, and that he had discharged the contract of sale, a request of the defendant for a ruling, in substance that the plaintiff could not recover unless the jury found that the plaintiff and his customer had released each other from the contract of sale, properly may be refused.

It appeared that the above described action was upon a right of recovery which was alleged to have vested in the plaintiff on a certain day, but that the foreclosure sale did not occur until sixteen days later. Neither in the pleadings nor at the trial of the action was any question raised as to the action being brought prematurely, and no exception was taken. *Held*, without determining that there was merit in such contention, that under the circumstances it was not open to the defendant in this court.

CONTRACT upon an oral agreement described in the opinion. Writ dated January 3, 1917.

In the Superior Court the case was tried before *Callahan, J.* The material facts and the course of the trial are described in the opinion. There was a verdict for the plaintiff in the sum of \$449.32. The defendants alleged exceptions.

C. S. Hill, for the defendants.

A. J. Berkwitz, (*E. M. Dangel* with him,) for the plaintiff.

CARROLL, J. The plaintiff, the owner of a certain parcel of real estate in Boston, had contracted to convey to one Wallace a one half interest in the same. The defendants were the holders of a second mortgage on the premises, which they were about to foreclose. There was evidence of an oral contract between the plaintiff and defendants that, if the plaintiff would discharge the agreement to sell to Wallace and not "appear when the foreclosure is going to take place," and "not bid in the property, and I [one of the defendants] will sell the property to Wallace," the defendants would pay the plaintiff \$425; that he discharged the Wallace agreement and did not appear at the foreclosure sale. The answer was a general denial, payment, and the statute of frauds. The jury found for the plaintiff.

The plaintiff cancelled and discharged the agreement with Wallace and refrained from attending the foreclosure sale. "This is not an action to enforce an oral contract for the sale of land or an interest in and concerning the same. The land has been sold and nothing remains to be done except for the defendants to account for and pay over the excess." *Zwicker v. Gardner*, 213 Mass. 95, 96. The promise to pay the money was separable from the part of the contract relating to the sale of the land, and as that part has been executed and nothing remains except the payment of the agreed sum, the statute of frauds is not a defence. *Zwicker v. Gardner, supra. Chace v. Gardner*, 228 Mass. 533, and cases cited. See *Bailey v. Wood*, 211 Mass. 37.

The defendants asked the judge to instruct the jury "That unless the jury finds as a fact that the plaintiff waived his customer and that his customer and he released each other from the agreement in evidence because of the alleged promise to the plaintiff, the plaintiff cannot recover." They contend there is nothing to show that Wallace released the plaintiff from the contract to sell. The jury could have found that the plaintiff did not agree to secure the release of Wallace, but merely to discharge the plaintiff's rights under the contract against Wallace; and there was evidence that this was done.

The defendants now argue that the plaintiff's action is upon an alleged right to recover "vested in the plaintiff on July 1, 1916;" and that the demand then made was premature because the property was not sold at foreclosure until July 17, 1916. Without admitting that there is merit in the contention, it is enough to say that no exception was taken on this point in the trial court and the presiding judge was not asked to pass upon it. It is not now open to the defendants.

Exceptions overruled.

ANDREW G. STILES *vs.* MUNICIPAL COUNCIL OF THE CITY OF
LOWELL.

EDWARD H. FOYE *vs.* SAME.

Suffolk. December 5, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Lowell. Civil Service. Municipal Corporations, Removal of officers. Mandamus. Practice, Civil, Conduct of trial, Election.

Under the provision of the city charter of Lowell contained in St. 1911, c. 645, § 40, the treasurer and collector of taxes of that city can be removed from office by the municipal council only in the manner provided in the civil service law contained in St. 1904, c. 314, as amended by St. 1905, c. 243.

A statement contained in a vote of the municipal council of Lowell purporting to remove the treasurer and collector of taxes of that city, that "After due consideration of the testimony adduced at the hearing, and the exhibits, it appears that [the person in question] failed to exercise proper diligence in discharging the functions of his office. Therefore, we find such failure and neglect of duty is contrary to the good of the service," does not supply the want of a compliance with the provisions of the civil service law, where no notice of the proposed action ever was given and no copy was furnished to the person sought to be removed of any writing stating specifically the reasons of removal and no opportunity was afforded him to prepare and present his defence as required by St. 1904, c. 314, St. 1905, c. 243.

The same is true in regard to a like vote passed under like circumstances purporting to remove the purchasing agent of Lowell.

In the case last mentioned it was *pointed out* that a letter of the city solicitor to the petitioner's counsel advising him of the nature of the evidence to be introduced at the hearing did not cure the failure to comply with the provisions of the statute, which requires specifications not from the city solicitor but from the municipal council.

At the hearing by a single justice upon a petition for a writ of mandamus addressed to the municipal council of a city commanding the members of that council to reinstate the petitioner as an officer of the city, where the respondents have filed a plea in abatement and also have demurred to the petition and likewise have filed an answer, it is within the discretionary power of the single justice to order the respondents to elect whether they will proceed on the plea in abatement or on the demurrer or on the answer.

TWO PETITIONS, filed on June 25, 1917, for writs of mandamus addressed to the municipal council of Lowell commanding the members of that council to reinstate the petitioners respectively

as the treasurer and collector of taxes and as the purchasing agent of that city.

The respondents filed a plea in abatement and also a demurrer to each of the petitions, each plea stating that the demurrer was not waived and each demurrer stating that the plea was not waived. The respondents also filed an answer to each of the petitions, in each answer "not waiving their demurrer or plea in abatement heretofore filed."

The cases were heard together by *Carroll, J.* He ordered the respondents to elect whether they would proceed on their pleas in abatement, their demurrers or their answers, and also gave the respondents an opportunity to amend their pleadings, but no amendment was requested nor was made. The respondents elected to be heard on their answers, subject to their exceptions to the order of the single justice.

The essential facts that appeared at the hearing are stated in the opinion. The single justice ordered as matter of law that peremptory writs of mandamus should issue as prayed for and at the request of the parties reported all questions of law in the cases for determination by the full court.

S. E. Qua, (*F. W. Qua* with him,) for the petitioners.

W. D. Regan, for the respondents.

BRALEY, J. It was held in *Thomas v. Municipal Council of Lowell*, 227 Mass. 116, that the words, "under the laws regulating the civil service" as used in St. 1911, c. 645, § 40, which is the city charter, mean that the removal or suspension "for such cause as it shall deem sufficient" of "any executive or administrative officer or head of a sub-department" the municipal council had the power to appoint, must be effected in the manner provided in St. 1904, c. 314, as amended by St. 1905, c. 243. The validity of the removal by the respondents of the petitioner *Stiles* from his office of city treasurer and collector of taxes, and of the petitioner *Foye* as purchasing agent for the city, which offices the council under St. 1911, c. 645, §§ 37, 39, had the power to fill, is therefore to be determined under the laws governing the civil service.

The material portion of the vote of the council removing the treasurer reads as follows, "After due consideration of the testimony adduced at the hearing, and the exhibits, it appears that

Andrew G. Stiles failed to exercise proper diligence in discharging the functions of his office. Therefore, we find that such failure and neglect of duty is contrary to the good of the service." But as the record shows that no notice of the proposed action ever was given, or copy furnished the petitioner stating specifically the reasons of removal, or a reasonable opportunity afforded him to prepare and present his defence as required by St. 1904, c. 314, St. 1905, c. 243, the order cannot be sustained. It is a nullity. *Hill v. Mayor of Boston*, 193 Mass. 569, 573. *Lattime v. Hunt*, 196 Mass. 261, 266. *McCarthy v. Emerson*, 202 Mass. 352. *Tucker v. Boston*, 223 Mass. 478. *Thomas v. Municipal Council of Lowell*, 227 Mass. 116.

What has been said applies equally to the removal of the petitioner Foye, as no specifications of the reasons upon which the respondents proposed to take action appear in the order notifying him of the hearing. The statement in the order, that the council proposed to remove him from the office of purchasing agent for the good of the service, is not a compliance with St. 1904, c. 314, §§ 1, 2, as amended. Nor did the letter of the city solicitor to the petitioner's counsel advising him of the nature of the evidence to be introduced at the hearing cure this radical defect. It is the municipal council, and not the city solicitor which is to furnish proper specifications, and this duty cannot be evaded or lawfully delegated. The final order also having stated that the petitioner is removed "for the good of the service" was ineffectual for reasons previously stated. The cases of *Ayers v. Hatch*, 175 Mass. 489, *Hogan v. Collins*, 183, Mass. 43, and *O'Brien v. Cadogan*, 220 Mass. 578, on which the respondents rely as stating a different rule, are very plainly distinguishable. In the first two cases the officials removed were not classified under the civil service and the special acts under which action was taken did not require the reasons to be "specifically given in writing" as in the cases at bar, while in the last case no question was raised that the order demoting the petitioner from the rank of sergeant to the rank of patrolman because "there are too many sergeants now acting for the force employed and your services are not necessary" was insufficient, as it certainly was not.

The order of the single justice that the respondents should elect whether they would proceed on the plea in abatement or on the

demurrer or the answer, was a matter of discretion, the exercise of which shows no error of law. R. L. c. 192, § 5. *Finlay v. Boston*, 196 Mass. 267. *Hill v. Mayor of Boston*, 193 Mass. 569, 575. *Sears v. Nahant*, 208 Mass. 208.

A peremptory writ of mandamus as prayed for is to issue in each case, commanding the respondents to recognize each petitioner as holding the office to which he is entitled, and ordering that the person who claims to hold such office under an unauthorized election by the respondents shall cease and refrain from interfering in any way with the petitioner in the performance of the duties of his office or attempting to perform or usurp the duties appertaining to such office. *Hill v. Mayor of Boston*, 193 Mass. 569, 575.

So ordered.

MARY E. COFFEY vs. WEST ROXBURY TRAP ROCK COMPANY.

Suffolk. December 6, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, In blasting. *Evidence*, Circumstantial.

In an action against a corporation that had been engaged in blasting for the construction of a sewer for alleged damage to the plaintiff's house by an explosion, if there is evidence that the defendant had been using dynamite, that the explosion took place where the sewer was in process of construction and that there was no other blasting in the vicinity at the time, that the explosion was unusual and extraordinary and that the plaintiff's building was shaken and the walls and ceilings cracked, and if there also is evidence that with a proper blast, properly set, there would be no cracking of walls in the adjoining premises, the case is for the jury, who would be warranted in finding that the explosion occurred in the sewer that was being constructed by the defendant and that the defendant was careless in doing the blasting.

TORT against a corporation engaged in constructing a sewer in Judson Street in the part of Boston called Roxbury for damage done on May 15, 1915, to the plaintiff's house numbered 28 on Judson Street alleged to have been caused by negligent blasting by the defendant. Writ dated October 20, 1915.

In the Superior Court the case was tried before *Brown, J.* The

evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That upon all the evidence the verdict must be for the defendant.

"2. That there is no evidence sufficient to warrant the finding that the defendant, its agents or servants, were guilty of negligence in carrying on their blasting operations.

"3. That there is no evidence to warrant the jury in finding that the defendant failed to take any precautions in the conduct of its blasting operations which should have been taken by any reasonable and prudent man engaged in and acquainted with such work under similar conditions."

The judge refused to make any of these rulings. He submitted the case to the jury, concluding his charge as follows: "Now you are to take all the testimony, conflicting testimony, and find out who is telling the probable story, the reasonable story, the true story, and when you have determined that, why you have settled the difficulties in this case. If you find it was negligent blasting and it caused these cracks that the plaintiff complains of, then she is entitled to recover; if it was not negligent blasting or did not cause these cracks she cannot recover, that is all there in is the case."

The jury returned a verdict for the plaintiff in the sum of \$550; and the defendant alleged exceptions.

C. H. Cronin, for the defendant.

C. W. Rowley, (*W. M. Robinson* with him,) for the plaintiff.

CARROLL, J. The plaintiff was the owner of a house on Judson Street, Roxbury, which she alleged was injured by reason of the negligence of the defendant while engaged in blasting for a sewer. There was a verdict for the plaintiff.

The plaintiff asserted that the blast occurred between "7:30 and 8 A. M." on May 15, 1915. The defendant's witness testified that at this time it was engaged in concreting; that no blasting ever was done before eight o'clock in the morning and that none was done in front of the plaintiff's house after May 8, 1915; that no explosion occurred in the defendant's trench or about it on May 15; and that at no time did the earth side of the trench cave in or was the street disturbed by any explosion. It was agreed that the defendant contracted to build a sewer through Judson

Street in front of the plaintiff's premises; that in order to do the work it was necessary to blast rock; and for this purpose dynamite was used, for which use the defendant had a license.

While the plaintiff did not show by any direct evidence that the explosion came from the defendant's trench, there was evidence that on the morning of May 15, before eight o'clock, there was an explosion which jarred the house, broke some glass, and cracked the ceilings; that the sewer was being constructed in Judson Street at the time; "that the explosion appeared to come from the front of the house; that blasting had been going on in Judson Street at different times for about a month" and that on this morning rocks were seen "flying in the air from the direction of Judson Street over the roofs of the houses in the neighborhood of the plaintiff's house and toward his [the witness's] house." The president and treasurer of the defendant company testified that it "did blasting in front of the plaintiff's house," and that he "knew of no other blasting in the vicinity at the time."

While there is very little evidence to show that the blasting or the explosion which injured the plaintiff's house was caused by the defendant, we cannot say there is no evidence tending to establish that fact. The defendant had been using dynamite, the explosion came from the place where the sewer was in process of construction, and there was no other blasting in the vicinity at the time. Upon these facts the jury could find that the explosion occurred in the defendant's sewer.

Apart from the circumstance that the explosion was unusual and extraordinary, there was evidence of the defendant's negligence. It was shown that with a proper blast, properly set, there would be no cracking of walls in the adjoining premises; and, if the plaintiff's building was shaken and the walls and ceilings cracked, as testified to by her, by a blast of the defendant, it would show carelessness of the defendant. The case was for the jury and we find no error of law.

Exceptions overruled.

WILLIAM MULLIN vs. JOSEPH F. FALLON.

Norfolk. December 7, 1917. — January 5, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Contributory.

In an action for personal injuries sustained, after St. 1914, c. 553, went into effect, by a boy about ten years of age from being run down by a motor car driven by the defendant when the plaintiff was crossing a public square on foot, where the answer alleged that the plaintiff was not in the exercise of due care and where there was evidence that the plaintiff went across the square "on a dog trot" continuing in the same direction, and the plaintiff testified that when about to cross he looked up and down and heard no automobile horn and did not change his course from the time he left the curbstone, and there was evidence "that the automobile changed direction and ran the plaintiff down; that it seemed to chase him," it was *held* that the plaintiff had a right to go to the jury on the question of his due care.

TORT for personal injuries sustained at about ten o'clock on the morning of August 23, 1914, a pleasant Sunday, from the plaintiff, a boy ten years of age, being run down by a motor car driven by the defendant when he was crossing Harvard Square at the junction of Harvard Street and Washington Street in Brookline. Writ dated November 18, 1914.

The answer, besides a general denial, contained an allegation that the plaintiff at the time of his injury was not in the exercise of due care. St. 1914, c. 553, took effect on May 21, 1914.

In the Superior Court the case was tried before *Wait, J.* There was evidence warranting a finding that the defendant was negligent. The evidence in regard to the exercise of due care by the plaintiff is described in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for him. This the judge refused to do and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$3,119. The defendant alleged exceptions.

C. S. Knowles, for the defendant.

J. F. Scannell, for the plaintiff.

CARROLL, J. The plaintiff, a boy ten years of age, while crossing Harvard Square, Brookline, was struck and injured by a motor car

driven by the defendant. The only question raised by the bill of exceptions is the due care of the plaintiff. The accident occurred August 23, 1914. The jury found for the plaintiff.

The defendant's contention was that, while he was proceeding outbound through Harvard Square and moving at about eight miles an hour, the plaintiff ran out from the sidewalk on the defendant's right and crossed the square without looking; that after he had passed beyond and in front of the defendant's car, he suddenly turned and stepped into the forward left hand side of the car. There was also evidence that the plaintiff went across the square "on a dog trot," continuing in the same direction, "that the automobile changed direction and ran the plaintiff down; that it seemed to chase him." The plaintiff testified that he looked up and down when about to cross, and heard no automobile horn, and did not change his course from the time he left the curbstone. On this evidence, the plaintiff's care was clearly a question for the jury. *Creedon v. Galvin*, 226 Mass. 140. See also *Rasmussen v. Whipple*, 211 Mass. 546; *Shipelis v. Cody*, 214 Mass. 452.

Exceptions overruled.

CHARLES H. DAMON vs. JOHN T. KALER & others.

Essex. November 7, 1917. — January 7, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Existence of relation, Scope of authority. Evidence, Relevancy and materiality.

In an action of tort against a firm of insurance brokers for damages resulting from negligence of another broker, alleged to have been the defendant's agent, in failing to procure an assent of an insurance company to a change of location of furniture insured by the company through the agency of the defendants, there was evidence tending to show that the alleged negligent agent had been employed in the defendant's office for three years; that he held a license, procured by them, to act as broker for an insurance company other than the one that insured the furniture in question; that he procured applications for insurance by that company, upon which policies were countersigned by the defendants and were issued if the defendants in their discretion thought best, the agent being paid a commission therefor; that he also procured from that company for persons insured by it assents to changes of location of property; that the agent procured

from the plaintiff an application for a policy in his company; that, when he submitted it to the defendants, they crossed out the name of his company and substituted the name of another company, issued the policy, and paid a commission to the agent; that subsequently, upon the plaintiff changing his location, the agent took the policy from the plaintiff and procured an assent of the company to the change; that later, when the plaintiff again changed his location, the agent took the policy to procure the assent as before, but negligently failed to do so. *Held*, that on the evidence findings were warranted that, in taking the plaintiff's policy and undertaking to procure the company's assent, the agent was acting as an agent for the defendants and within the scope of his authority. Upon the issues above described, it was relevant and material to show that the agent had been allowed a commission by the defendants when the policy in question was issued to the plaintiff; that, on the occasion of the previous removal by the plaintiff, he had given the policy to the agent who had given it to the defendants and that they had indorsed upon it their assent to the removal and had returned it to the agent, who had returned it to the plaintiff, as well as evidence of the relations between the agent and the defendants as to the insurance company for whom he held a broker's license procured by them.

TORT for damage resulting from a negligent failure of an alleged agent of the defendants to procure and attach to a policy of insurance covering furniture of the plaintiff a consent of the insurance company to a removal of the furniture to a new location. Writ dated July 14, 1915.

In the Superior Court the case was tried before *Hamilton, J.* The material facts and evidence are described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for the defendants, and also asked for the following rulings among others:

- "1. Upon all the evidence the plaintiff cannot recover.
- "2. Upon all the evidence it cannot properly be found that the defendants are legally responsible to the plaintiff for any neglect of which Mr. Hallett may have been guilty in connection with the not obtaining the assent of the Buffalo German Insurance Company to the transfer of the plaintiff's property to the location where the fire occurred.
- "3. There is no evidence of negligence on the part of the defendants.
- "4. There is no evidence of any neglect on the part of the defendants of any duty which they owed to the plaintiff."
- "6. The fact, if it be a fact, that Mr. Hallett was paid or allowed a commission by the defendants when the policy was issued is immaterial to any issue involved in this case."

"8. The fact that on the occasion of the plaintiff's removal from Lynn to Nahant he gave the policy in question to Mr. Hallett and Mr. Hallett procured the assent of the defendants to such removal and they made the necessary indorsement on the policy and gave the policy back to Mr. Hallett, is immaterial to any issue involved in this case."

"15. When the plaintiff gave the policy in question to Mr. Hallett for the purpose of obtaining the assent of the Buffalo German Insurance Company to the removal of his property to the building where the fire occurred, Mr. Hallett thereupon became, for that purpose, the agent of the plaintiff."

"17. The fact that the defendants, as agents for the Westchester Fire Insurance Company, had frequent dealings with Mr. Hallett, who was also an agent of that company, with relation to policies of that company is immaterial to any issue involved in this case.

"18. Whatever duties Mr. Hallett was under to the plaintiff sprang from his promise to obtain the assent of the company to the transfer and not from any relationship which existed between himself and the defendant."

The motion was denied and the rulings were refused. The jury found for the plaintiff in the sum of \$329.80. The defendants alleged exceptions.

W. L. Came, for the defendants.

G. Newhall, for the plaintiff.

PIERCE, J. The defendants are general insurance brokers and are agents of certain foreign and domestic insurance companies with offices in Boston. On May 8, 1914, the plaintiff became a holder of a policy of the Buffalo German Insurance Company, a company represented by the defendants, for a term of three years, on household furniture in Lynn. Subsequently, on the removal of the plaintiff to Nahant, the policy ceased to be in force in the former location and thereafter covered the property described therein at the new location with "the assent in writing or in print of the company" as shown by a "rider" which was attached to the original policy and countersigned by the defendants as agents of the insurance company. On a Saturday in January, 1915, the plaintiff changed his residence again. Before moving he had told one Hallett that he was going to move, and Hallett had told him

"that he had better bring in the policy and have it transferred." Hallett had taken the policy to the defendants at their office in Boston, and had returned it to the plaintiff after the rider was put on at the time the policy was "transferred to Nahant." On the following Monday the plaintiff brought the policy and handed it to Hallett upon Hallett's statement that he would fix the business up the same as he did when he, the plaintiff, moved from Lynn. Hallett put the policy in his pocket, went to Boston the next day but "forgot to have the transfer made." On the following Wednesday, the furniture was destroyed by fire and the defendants had not been notified of the removal.

No question arises as to the negligence of Hallett. The question at issue is, was the evidence sufficient to warrant the finding of the jury that Hallett undertook, as the agent of the defendants and within the scope of his authority, to have the policy of the plaintiff delivered to the defendants to be changed so as to bear the assent of the company to a removal of the insured property to a different location.

Upon this issue there was evidence that Hallett "went to work for" the defendants three years before the occurrence with the plaintiff; that his work was writing applications for fire insurance; that he held a license, procured and paid for by the defendants, to write insurance in the Westchester Fire Insurance Company; that he didn't sign policies in that company; that the defendants did sign them on his applications, if they thought the risk was up to the standard; that the defendants charged him with the premiums and credited him with the commissions upon all policies issued on his applications; that the defendants delivered the policies to him and he delivered them to the assured; that when an assured was going to move he would send his policy into the office by Hallett to have a rider attached; that the company if it wished to assume the new risk would attach the rider and the policy would be mailed back to Hallett who would deliver it to the assured; that sometimes there would be a decrease in premium, if the risk was better than the one on which the original policy was written, and sometimes there would be an increase; and that this happened quite frequently.

Specifically as regards the policy of the plaintiff, there was evidence that Hallett "got the plaintiff's policy in the same way

that he got the others;" that he took in the application as usual and later a policy was issued; that he applied for a policy in the Westchester; that the defendants struck out from the application the words and figures "Westchester \$500" and issued on the same application a policy in the same amount in the Buffalo German Insurance Company; that the policy was delivered to Hallett; that Hallett was charged with the premium and credited with the commission, and that the policy thereafter was delivered to the plaintiff who paid the premium to Hallett.

On the above facts and the inferences to be drawn therefrom, we think the jury would be warranted in finding that Hallett was the agent of the defendants and that he acted within the scope of his authority in undertaking to deliver the policy of the plaintiff to the defendants.

It follows that the motion to direct a verdict on all the evidence was denied rightly, as were the requests numbered two, three, four, fifteen and eighteen, each of which rests upon the assumption that Hallett was the agent of the plaintiff and was not the agent of the defendants.

The facts assumed in requests numbered six, eight and seventeen were properly received as relevant to the proof of the business relation of the parties to be inferred from other transactions in their nature closely related to the facts in issue.

Exceptions overruled.

WILLIS F. GRANT vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 9, 1917. — January 7, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Plaintiff's due care, In use of highway, Street railway. *Practice*, Civil, Waiver of right given by statute. *Waiver*.

Where the trial of an action of tort, against a street railway company for personal injuries, received after St. 1914, c. 553, went into effect and resulting from the plaintiff being run into in the night time by a street car of the defendant as he was crossing a highway at a cross walk lighted by street lights, was tried on the footing of an action for injuries received before that statute went into effect, and there was evidence warranting, among other findings, findings that the plaintiff as he approached the defendant's tracks was conscious of his danger and

had his mind actively directed to its avoidance, that he looked in both directions for approaching cars and saw none, that, until he was within fifteen feet from the track, his view in the direction from which the car that struck him came was obscured by a team and that until it was too late to avoid the accident he did not look again in that direction because he was required to pick his way with care over the cross walk owing to its being made treacherous by small stones and gravel placed there during street repairs, the question of his due care is for the jury.

At the same trial there was evidence tending to show that the defendant's rules required the motorman to use extra care in passing excavations near a track such as were shown to exist in this case; that he saw the plaintiff when the car was seventy-five feet from the cross walk and the plaintiff was fifteen feet from the street car rail, walking slowly; that the motorman started to slow up, that the plaintiff went more slowly when within four or five feet of the rail and that then the motorman put on speed and "took a chance to slow up" and stop the car if the plaintiff kept on going; and that the car was going at the rate of five miles an hour and could have been stopped within twenty-five or thirty feet. *Held*, that the question of the negligence of the motorman was for the jury.

In this action for personal injuries received after St. 1914, c. 553, went into effect, where the plaintiff attempted to waive the provisions of that statute and consented to the judge charging the jury that the statute put upon the defendant only the burden of going forward and did not disturb nor change the burden of proof, the jury found that the plaintiff was in the exercise of due care, and this court *stated* that the question, whether such a waiver by the plaintiff could be made, had become immaterial.

TORT for personal injuries received on September 19, 1914, when the plaintiff was struck by an electric street car operated by the defendant as he was crossing Tremont Street toward Waltham Street in Boston. Writ dated April 22, 1915.

In the Superior Court the case was tried before *Hall*, J. The material evidence is described in the opinion. At the close of the evidence the defendant presented a motion in writing that a verdict be ordered for the defendant. The motion was denied.

The defendant also presented, among others, requests for the following rulings:

"If it appears from the testimony of the plaintiff himself that he was not in the exercise of due care at the time of and immediately preceding the accident, then he cannot recover."

St. 1914, c. 553, "creates no affirmative evidence of the plaintiff's due care."

If St. 1914, c. 553, "by its terms creates a presumption of the fact of the plaintiff's due care, it is contrary to art. 14 of the Amendments to the Constitution of the United States, and therefore unconstitutional and void."

If St. 1914, c. 553, "by its terms creates a presumption of the fact of the plaintiff's due care, it is contrary to art. 10 of the Declaration of Rights and is therefore unconstitutional and void."

At a colloquy between the trial judge and counsel the judge stated that he should refuse to give the foregoing rulings and would save the defendant's exceptions. Rather than have the defendant's exceptions saved to such refusal, the plaintiff's attorney then consented that the judge should charge the jury as hereinafter described and the defendant waived its exceptions to the refusal of the judge to give the foregoing rulings.

The defendant also asked for the following rulings, which were refused:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. Upon all the evidence in the case there is no evidence that the plaintiff was in the exercise of due care, and therefore he cannot recover.

"3. Upon all the evidence in the case there is no evidence of any negligence of the defendant's agents or servants, and therefore the plaintiff cannot recover."

"5. The testimony of the plaintiff, if believed, shows as a matter of law that he was not in the exercise of due care."

The judge, at the close of that part of his charge relating to the plaintiff's due care, instructed the jury as follows:

"It is agreed for the purposes of this case that I may instruct you that the recent statute which says that a plaintiff shall be presumed to be in the exercise of due care puts upon the defendant only the burden of going forward, and does not disturb nor change the burden of proof, and in giving you that as the law for the purposes of this case by agreement, you see now it becomes very important for you to determine whether or not upon all the evidence in this case Mr. Grant has sustained the burden of showing to you that he was in the exercise of such care, and his carelessness didn't contribute to this accident at all."

The jury found for the plaintiff in the sum of \$2,500. The defendant alleged exceptions.

E. P. Saltonstall, for the defendant.

C. H. Donahue, (*W. T. Atwood* with him,) for the plaintiff.

PIERCE, J. This is an action of tort to recover for personal injuries received by the plaintiff on September 19, 1914. Upon the footing of an action arising and tried before St. 1914, c. 553, at the close of the evidence the defendant in writing moved the court to rule that "upon all the evidence the plaintiff was not entitled to recover." This the court refused to do and the defendant's exception to this refusal was duly saved.

The jury would have been warranted in finding the substantial and material facts to be as follows: The plaintiff was fifty-three years of age and in the full possession of his faculties, both sight and hearing. On the evening of the accident he was returning from the Boston Public Library to his home and was crossing Tremont Street from an "island" on its northerly side to Waltham Street on its southerly side, on the westerly or out of town cross walk. He was struck by an outbound car just as he stepped across the first rail of the outbound track. It was night time and dark but the street lights were lighted and the stores in the vicinity were opened and lighted up. The cross walk measured seventy feet from curb to curb. From the curbing of the "island" to the first rail of the outbound track, and place of the accident, the distance is thirty-one and one half feet.

At the time of the accident, the surface of Tremont Street between the outbound track and the "island" had been removed for repaving on both sides of the cross walk, but more on the right than on the left. The flagstones of the cross walk remained in place. The cross walk was about five feet in width, and on its surface there were stones and dirt and gravel which had come from adjoining piles of gravel. The paving stones, which had been taken up, were piled along the rail and also near the curb of the "island." There were wooden horses, parallel with the cross walk near the track, with red lights on them, and also, wooden horses near and parallel with the track on either side of the cross walk. On the "island" near the intown or easterly cross walk from Waltham Street, was a watering trough for horses, which was thirty-five feet east of the westerly cross walk. At the time of the accident there was a two-horse covered team drawn up toward and headed in the direction of the watering trough. On the "island" there was a police signal box twelve and one half feet west of the westerly cross walk. In the daytime a person standing on the

curbing of the "island" in front of the cross walk could see in the direction of Boston at least five hundred feet and in a westerly direction toward Roxbury about three thousand feet.

The plaintiff testified: "As I stepped on the cross walk I looked down toward Boston, at my left. And after looking down there carefully I looked the other way. . . . I next looked toward — to my right after I had stepped a little further and I saw no car coming from that direction, and I walked along and kept walking toward the track on the cross walk and when I got about half way across I looked again toward Boston and saw no cars, and then as I walked along further I looked in the other direction and of course I had to pick my way along to avoid stepping on anything on the cross walk, and as I reached the other track I was looking in the direction away from Boston." He further testified that he "had to look a little more carefully on account of looking over those red lights, . . . they were a little dazzling. . . . I had to watch my step to avoid stepping on those little stones and things. It took some of my attention. . . . I reached the track and had just stepped across" the first rail "with one foot and I heard the gong strike of the electric car at my left and I turned quickly toward — facing the car, and tried to jump back, but it was on me before I could get back. The car struck me before I could get out of the way." He further testified, that "when he was leaving the curb or about there he saw a large team drawn up toward the watering trough;" that the team was between him and the outbound track; that he could not see down the track much beyond the team; that when he looked toward Boston the second time, then being about fifteen feet from the nearest rail, he could see quite a long way, nearly down to Hanson Street; that he did not see any car; that the track was all free and clear so far as he could see, down about one hundred and fifty feet; that as he looked he was walking toward the track at the rate of perhaps two and one half miles an hour; that after coming out from behind the team "he had as clear a view as you could have at night of the rail down toward Boston" and "during the time he was passing over that ten feet he did not look toward Boston as he was looking in the other direction for inbound cars." He then said, that his reason for not looking again was that the tracks were clear when he was within fifteen feet of the rail, that he had to

watch his steps because of the stones and gravel on the cross walk and believed he had plenty of time to get across before any car could reach him.

It is the contention of the defendant that had the plaintiff looked toward Boston at any time when he was within ten feet of the rail, he would have seen the car in season to have avoided it; and that not to have seen it and not to have looked were equally acts of negligence which required a ruling of want of due care, and cites *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242, *Beirne v. Lawrence & Methuen Street Railway*, 197 Mass. 173, *Willis v. Boston & Northern Street Railway*, 202 Mass. 463, *Collins v. Boston Elevated Railway*, 218 Mass. 284.

While the question is close, we think the fact that the defendant was conscious of his danger and had his mind actively directed to the avoidance of harm, the fact that he could be seen by the motorman as he came out from behind the team, the fact that his attention was required to guard his steps while passing over the cross walk made treacherous by the presence thereon of small stones and gravel, and all the other circumstances of time and place, distinguish the case at bar and require that the issue of the due care be left to the consideration of the jury. *Lunderkin v. Boston Elevated Railway*, 211 Mass. 144. *O'Toole v. Boston Elevated Railway*, 211 Mass. 517. *Foster v. Boston Elevated Railway*, 214 Mass. 61.

The request to rule that there was no evidence of any negligence of the defendant's agents and servants could not have been given properly. The motorman testified that the rules required extra care in passing excavations near the track; that he saw the plaintiff when the car was seventy-five feet away from the cross walk; that the plaintiff was fifteen feet from the rail, moving slowly; that he (the motorman) started to slow up; that the plaintiff moved more slowly when within four or five feet of the rail; that he (the motorman) then put on speed, that he "took a chance to slow up" and stop the car if the plaintiff kept on going; that the car was going at the rate of five miles an hour and could have been stopped within twenty-five or thirty feet.

As the jury found for the plaintiff upon the issue of his due care and the negligence of the defendant, it becomes immaterial to determine whether in an action arising after the St. 1914,

c. 553, as this action did, the plaintiff can waive the provisions of that statute and with the consent of the presiding judge and the defendant agree that the judge shall instruct the jury, "that the recent statute which says that a plaintiff shall be presumed to be in the exercise of due care puts upon the defendant only the burden of going forward, and does not disturb nor change the burden of proof."

Exceptions overruled.

ABRAHAM SHUMAN & others vs. GEORGE W. GILBERT.

Suffolk. November 9, 1917. — January 8, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Demurrer, Misjoinder. *Equity Jurisdiction*, To enjoin criminal prosecution. *Hawkers and Peddlers*.

In a suit in equity by six plaintiffs, each engaged in a different business, to enjoin an alleged anticipated unlawful interference with their business, the defendant demurred, assigning various causes of demurrer but not assigning as a cause of demurrer the improper joinder of the plaintiffs in a single suit, and the question of misjoinder of the plaintiffs was treated by this court as not open upon the demurrer.

A suit in equity cannot be maintained by one engaged in business to enjoin the chief of police of a city from committing an alleged apprehended unlawful interference with the plaintiff's business by instituting a complaint against the plaintiff for an alleged violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1, in regard to hawkers and peddlers by exhibiting samples of his goods in a room hired by him in a hotel in that city without first obtaining a license.

The fact, that a person engaged in business may be injured in respect to his business by prosecution for an alleged crime, in conducting his business in an unlawful manner, is not a sufficient ground for a suit in equity by that person asking the court to ascertain in advance whether the business as conducted by him is in violation of a penal statute.

In the case in which the points above stated were decided, it was *said* that whether the plaintiffs, or any of them, were guilty of any infraction of the criminal law was a question to be tried in a criminal court and not in this suit in equity.

BILL IN EQUITY, filed in the Superior Court on April 16, 1917, and afterwards amended, by the members of a business firm and five business corporations against the chief of police of the city of Northampton, to enjoin the defendant from unlawfully interfering with the plaintiffs' business by arresting or prosecuting

them for exhibiting and selling by sample for future delivery goods, wares and merchandise in the city of Northampton without a license in alleged violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1.

The defendant's answer contained a demurrer as described in the opinion.

The case was heard by *Jenney, J.*, upon the demurrer. He made an order that the bill be dismissed without costs. Later by order of the judge a final decree was entered that the demurrer to the bill as amended be sustained and that the bill be dismissed. The plaintiffs appealed.

H. F. Wood, (*A. Williams* with him,) for the plaintiffs.

J. C. Hammond, in the absence at the front in France of his son Captain T. J. Hammond, for the defendant.

Rugg, C. J. This is a suit in equity in which six plaintiffs join in alleging that they are merchants having permanent places of business, five of them in Boston and one in Springfield, and that occasionally at various times during the year they hire rooms in a hotel in Northampton and there display goods and merchandise as samples, making no sales from that stock but taking orders at retail for future delivery from their places of business in Boston or Springfield. The defendant is the chief of police of Northampton, who asserts that the plaintiffs have no right to conduct business in this manner without licenses, and threatens to institute complaints against them for violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1, whereby hawking and peddling and the selling by itinerant vendors in general, with some exceptions, is prohibited. The prayers of the bill are that the defendant be forever enjoined from arresting their agents or otherwise interfering with the conduct of their business, and that the question whether they are violating the statute be determined. The defendant demurred upon several grounds. As he has not raised the point that the plaintiffs cannot join in such a suit, that is passed by. *Stevens v. Rockport Granite Co.* 216 Mass. 486, 493.

The plaintiffs do not allege nor argue that the statute under which the defendant proposes to prosecute them is unconstitutional on any ground, nor that its enforcement as to them would be an unlawful interference with interstate commerce. Their

simple contention is that their conduct as set forth in their bill is not a violation of the statute rightly construed.

It is the general rule that the prosecution and punishment of crimes will not be restrained by a court of chancery. But there is an exception to this comprehensive statement. Jurisdiction in equity to restrain the institution of prosecutions under unconstitutional or void statutes or local ordinances has been upheld by this court when property rights would be injured irreparably, and when other elements necessary to support cognizance by equity are present. *Greene v. Mayor of Fitchburg*, 219 Mass. 121, 127. *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 505. The statement of the law in England has been made rather broadly that there is no jurisdiction in equity (at all events since the abolition of the court of the Star Chamber, which exercised a jurisdiction of so called criminal equity) to enjoin prosecution for crime. *Saull v. Browne*, L. R. 10 Ch. 64. *Kerr v. Preston Corp.* 6 Ch. D. 463, 466. See also *Grand Junction Waterworks Co. v. Hampton Urban Council*, [1898] 2 Ch. 331, 341; *Merrick v. Liverpool Corp.* [1910] 2 Ch. 449, 460-462. But there seems to be a caution about saying that circumstances may not arise authorizing a close approach to such jurisdiction. *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch. 597. *Burghes v. Attorney General*, [1911] 2 Ch. 139, 156-157. It was said in *Truax v. Raich*, 239 U. S. 33, at pages 37, 38: "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621. That is the law of this Commonwealth. Doubtless that principle is generally recognized by the courts of this country. It has been applied to the institution of proceedings under statutes and ordinances, the enforcement of which would result in unlawful deprivation of the right to labor, *Truax v. Raich*, 239 U. S. 33, the illegal interference with the right to transact interstate commerce free from burdensome state restrictions, *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, *Lee's Summit v. Jewel*

Tea Co. 133 C. C. A. 637; 217 Fed. Rep. 965, *Herndon v. Chicago, Rock Island & Pacific Railway*, 218 U. S. 135, *Jewel Tea Co. v. Carthage*, 257 Mo. 383, 391, the confiscation of property or property rights, *Dobbins v. Los Angeles*, 195 U. S. 223, 241, *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 293, the denial of due process of law, *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U. S. 636, and the denial of the equal protection of the laws, *Ex parte Young*, 209 U. S. 123, 146, 147.

The jurisdiction in chancery thus recognized and exercised rests upon the fundamental and well established equitable doctrine that private personal and property rights will be protected by injunction from threatened irreparable unlawful injury. The injunction against the institution of criminal proceedings is simply incidental to that main ground of equitable jurisdiction. Where the facts are such as to call for the exercise of the powers of a court of chancery according to its established principles, the mere fact that, in order to grant the remedy afforded by equity, it may be necessary as a subsidiary step to enjoin the institution of criminal proceeding or even the commission of a crime, is no bar to the jurisdiction of equity. That this is the underlying principle is manifest from an examination not only of the cases above cited but of most other cases where the injunction has been granted or jurisdiction assumed.* This is but another way of stating the principle that, while as a general rule equity will not interfere by injunction with the prosecution of crimes, there is an exception where such prosecutions are founded on unconstitutional or void enactments and will result in immediate injury to property or property rights.

Some courts of equity have taken jurisdiction of causes on the ground of prevention of multiplicity of prosecutions, sometimes in combination with the circumstance that there was no relief by appeal. *Franklin v. Lacey*, 157 Ky. 261, 263. *Martin v. Baldy*, 249 Penn. St. 253, 258. It is possible that *Huntworth v.*

* *Mobile v. Orr*, 181 Ala. 308. *Abbey Land & Improvement Co. v. San Mateo*, 167 Cal. 434. *Southern Express Co. v. Ty Ty*, 141 Ga. 421. *Brown v. Abilene*, 93 Kans. 737. *Clark v. Hartford Agricultural & Breeders' Association*, 118 Md. 608, 615. *Michigan Salt Works v. Baird*, 173 Mich. 655. *Ideal Tea Co. v. Salem*, 77 Ore. 182. *Weyman-Bruton Co. v. Ladd*, 146 C. C. A. 94, (231 Fed. Rep. 898).

Tanner, 87 Wash. 670, may stand on some such ground, although the discussion in that opinion goes much further than that in any other case of which we are aware. Other courts have taken jurisdiction because there was arbitrary, oppressive and revengeful conduct amounting to a settled malicious purpose to cause irreparable damage to the property rights or personal liberty of the complainant by numerous or successive prosecutions. *Cutsinger v. Atlanta*, 142 Ga. 555, 573, 574. *Alexander v. Elkins*, 132 Tenn. 663. *Baldwin v. Atlanta*, 147 Ga. 28. Without pausing to discuss or to consider the soundness of those principles, it is enough to say that there are no allegations to bring the case at bar within them. A possibility that complaints may be lodged against six persons is not enough under these circumstances to make out a case of multiplicity. The allegations as to repeated complaints are not sufficient to warrant the inference that the courts of this Commonwealth will countenance continued and oppressive prosecutions when once a genuine test case open to fair question has been presented and is on its way to final decision.

The allegation of the bill in the case at bar is, that to determine the question whether they "come within the purview of the statutes" as contended by the defendant, "will take several months before a decision relative thereto can be had from the Supreme Court; that the said defendant has stated that he will arrest and prevent the plaintiffs from exhibiting as aforesaid in said city of Northampton, even during the time a test case is awaiting a decision by the Supreme Court, unless the plaintiffs are duly licensed forthwith by the said commissioner of weights and measures either as itinerant vendors or as hawkers and pedlers; that by reason of the defendant's threats and arbitrary attitude relative thereto, the plaintiffs would be prevented from carrying on their usual business as aforesaid in said city of Northampton while the said question would be pending before the Supreme Court; and that the plaintiffs would thereby sustain irreparable damage in that the seasons for exhibitions and sales by sample for future delivery as advertised will have passed, in that the profits therefrom would be wholly lost and in that the plaintiffs would be compelled at considerable expense to cancel reservations of accommodations heretofore made in said

city of Northampton, and would otherwise be greatly damaged." These allegations are to a considerable extent respecting the course of law and proceedings in court in this Commonwealth, and hence are not admitted by the demurrer. It assumes that one innocent of any infraction of the law will be found guilty by the district court and by the Superior Court, a presumption which as matter of law cannot be indulged, at least upon such general allegations.

The allegations as to property are nothing more than the ordinary averments which might be made by anybody engaged in business, undertaking a branch of commercial adventure believed by the officers charged with enforcing the law to be in contravention of some penal statute confessedly valid in itself. Simply that one is in business and may be injured in respect of his business by prosecution for an alleged crime, is no sufficient reason for asking a court of equity to ascertain in advance whether the business as conducted is in violation of a penal statute.

The conclusion is that the allegations of the bill do not make out a cause for equitable relief, but fall within the general principle that courts of equity will not enjoin the institution of proceedings to punish alleged crimes. While there is some diversity in the application of the governing principles, this result appears to be in harmony with most of the decisions already cited and is supported by the great weight of authority.*

Whether the plaintiffs or any of them are guilty of any infraction of the criminal law is a question to be tried in a criminal court and not in this proceeding.

Decree dismissing bill affirmed with costs.

* *Delaney v. Flood*, 183 N. Y. 323. *Sennette v. Police Jury of St. Mary's Parish*, 129 La. 728. *Snouffer & Ford v. Tipton*, 161 Iowa, 223. *Kleinks v. Oates*, 187 Mich. 548. *Milton Dairy Co. v. Great Northern Railway*, 124 Minn. 239. *Southern Express Co. v. High Point*, 167 N. C. 103. *Board of Supervisors v. Owen*, 100 Miss. 462. *Turner v. Ardmore*, 41 Okla. 660. *Sherod v. Aitchison*, 71 Ore. 446. *Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313. *Brunstein v. Fort Collins*, 53 Col. 254. *Hoffman v. Tooele*, 42 Utah, 353. See cases collected in L. R. A. 1916 C, note, pages 263 to 273.

CHARLES S. ENSIGN, JR., guardian, vs. JOSEPHINE FAXON.

Middlesex. November 13, 1917. — January 8, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Guardian. Probate Court, Accounts, Appeal, Decree.

Upon an appeal to the Supreme Judicial Court from a decree of the Probate Court upon an account of a guardian purporting to be a final account, a decree may be entered by order of a single justice which, following the practice in equity, makes an adjudication as to disbursements and charges of the guardian in connection with that account and hearings upon it up to and including the termination of proceedings respecting it.

Where a decree entered by order of a single justice upon such an appeal does not purport to make any adjudication as to disbursements and charges of the accountant since the date to which the "final account" runs and relating to the litigation as to the allowance of that account, but remands the case to the Probate Court "for further proceedings," the accountant should be permitted to file in the Probate Court a further account bringing before the court for determination the question whether such items should be allowed.

The mere fact that the account which was appealed from was entitled a "final account" does not preclude the accountant from seeking an adjudication upon the later items in the subsequent account.

By such an account, also, may be brought before the Probate Court the propriety of payments by the accountant of premiums upon his bond during years when the question of the allowance of the alleged final account was pending.

By R. L. c. 150, § 20, the guardian is given a right also to include in such an account an item showing a payment to the ward of a balance which by the decree modifying the former account was found still to be due to the ward from him.

APPEAL by the former guardian of Josephine Faxon from a decree of the Probate Court for the county of Middlesex allowing a motion of the ward that a ninth guardian's account be dismissed.

The first to the eighth accounts of the guardian previously were before this court upon appeals and decisions were rendered which are reported in 224 Mass. 145 and 226 Mass. 218. The eighth account was entitled "Guardian's Eighth and Final Account" and purported to cover a period ending with August 4, 1914. After the rescript issued in accordance with the decision in 226 Mass. 218, a decree entitled a "Final Decree" was entered on March 22, 1917, by order of a single justice of this court and by assent of the parties, which, so far as material, was as follows:

"The total amount with interest computed to March 20, 1917, with which the guardian is charged . . . being \$10,235.82, as balance in Schedule C of the Eighth and Final Account of said Guardian due said Josephine Faxon, and it is further ordered, adjudged and decreed that the appellant, Josephine Faxon, forthwith assign and deliver to the said guardian, Charles S. Ensign, Jr., the promissory note for \$5,000 and the mortgage securing said note given by Elizabeth Doherty and Edward J. Doherty to said Josephine Faxon . . . and as modified the various decrees of the Probate Court are affirmed, and the cause is remanded to the Probate Court for further proceedings."

Thereafter the former guardian filed in the Probate Court the ninth account, which now is in question. It charged the accountant, in schedule A, with the sum of \$8,974.83, which previously had been decreed to be due on the eighth account, and with various amounts of interest on balances previously decreed to be due because of modifications of the fifth, sixth, seventh and eighth accounts. In schedule B were credits to the accountant for expenses of witnesses, stenographers, a constable, printing of record and of briefs and services of an attorney and of the guardian, alleged to have been incurred in the hearings upon the first eight accounts; and also two items of payments made on February 10, 1916, and March 15, 1917, for "premium on guardian's bond," and the sum of \$7,428.06 alleged to have been paid to the ward.

The ward moved in the Probate Court to "dismiss the ninth account." The motion was heard by *Chamberlain, J.*, who made the following decree: "The within motion is allowed. The guardian having rendered a final account passed upon by the court, there is no warrant in law, as the case now stands, for a further accounting. The 'ninth account' is accordingly disallowed."

The former guardian appealed. The appeal was heard by *Loring, J.*, by whose order a decree was made, which recited that it appeared that the Doherty mortgage and mortgage note had been delivered to the former guardian in accordance with the decree entered by order of the single justice on March 22, 1917, and "ordered, adjudged and decreed that the decree of the Probate Court in the matter of the ninth account, be, and the same

hereby is, affirmed and said cause is remanded to said Probate Court for further proceedings."

The former guardian appealed.

G. M. Poland, (*L. P. Jordan* with him,) for the guardian.

C. M. Bruce, for the respondent.

Rugg, C. J. This is an appeal from a decree disallowing the ninth account of the petitioner as guardian of the respondent. The reason for this decree was stated in it to be that since the guardian has "rendered a final account passed upon by the court, there is no warrant in law, as the case now stands, for a further accounting." The account so passed upon by the court was entitled "Guardian's Eighth and Final Account." Questions respecting it came to this court in 224 Mass. 145, and in 226 Mass. 218.

The decree was final as to all matters within its sweep. The account to which it related, according to its statement of period covered, ended with August 4, 1914. The final decree on it was entered in this court on March 22, 1917. It contains no recital that it comprehends all matters relating to the estate of the ward after the date when the account was filed. It does include in the balance due from the guardian interest computed to March 20, 1917. It would have been within the power of the single justice to have made an adjudication as to the disbursements and charge of the guardian in connecting with that account up to and including the termination of proceedings respecting it. A decree may be made in this particular final, provided it appears by its express terms that that matter has been considered and disposed of. Thus an end may be put to litigation touching it. That is the practice in equity. *Bauer v. International Waste Co.* 201 Mass. 197. *Day v. Mills*, 213 Mass. 585. *Collins v. Snow*, 218 Mass. 542, 545. *Hanscom v. Malden & Melrose Gas Light Co.* 220 Mass. 1, 9. Probate practice in this court follows that of equity so far as practicable and applicable. *Chapman v. Chapman*, 224 Mass. 427, 428. It is in harmony with the decision between these parties in 224 Mass. 145, and with *Day v. Nichols*, 228 Mass. 236, 239. But the decree on the "Eighth and Final Account" does not show that this was done. The accountant, therefore, in justice ought to be allowed an opportunity to have his day in court at some time upon the question whether he ought to be allowed for his expenses incurred in connection with that

litigation. While other parties to that litigation are precluded from seeking their costs and expenses after its conclusion, R. L. c. 162, § 44, *Lucas v. Morse*, 139 Mass. 59, the guardian not having been required and not having elected to have those matters passed on in the earlier decree, may file a supplemental account in the Probate Court.

In the account now before us the guardian has charged against the estate disbursement made since the period covered by the eighth account and disconnected with litigation respecting it. He claims to be entitled to premiums paid on his bond as guardian. Such items ordinarily would not be introduced in an account upon appeal, although it is not decided that premiums on bonds may not be included for the purpose of making an account in truth final. This court does not act as a court of first instance in probate appeals. *May v. Skinner*, 152 Mass. 328.

It is not conclusive against the filing of another account that the next preceding account was described and treated as final and the decree thereon entitled final, provided justice appears to require a further accounting. *Baylies v. Davis*, 1 Pick. 206. *Foster v. Foster*, 134 Mass. 120.

According to the decree upon the last preceding account there was a balance in excess of \$10,000 due from the guardian. It was his duty under the earlier decree to pay that sum to Miss Faxon. He had a right under R. L. c. 150, § 20, to perpetuate the evidence that he disposed of that balance according to law by presenting an account of his payment to the Probate Court.

All these circumstances lead to the conclusion that some of the items set forth in the present account were not on their face included within nor disposed of by the former account and the decree thereon. The decree is reversed and the account is to stand for hearing.

So ordered.

CHARLES A. DIGNEY & others, trustees, vs. FRED F. BLANCHARD
& another.

Suffolk. November 13, 1917. — January 9, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To reach and apply property not attachable at law. *Equity Pleading and Practice*, Demurrer, Appeal.

A claim, arising from a decree, which was made in a suit in equity brought by trustees of a building trust and a receiver of the property of the trust appointed by a court of equity against a former trustee of the trust and which directed the defendant to pay to the plaintiffs a certain amount of money that represented losses sustained by the trust through breaches of trust by the defendant, is a "debt" within R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, giving jurisdiction in equity of suits to reach and apply in payment of a "debt, any property, right, title or interest, legal or equitable, of a debtor, . . . which cannot be reached to be attached or taken on execution in an action at law."

It here was *pointed out* that a claim for unliquidated damages arising from a breach of a contract cannot be reached to be attached or taken on execution in an action at law against the plaintiff by one of his creditors.

A right of such a debtor to damages, arising from a breach of a contract by a bank to lend to him a certain amount of money upon his note secured by a mortgage upon certain land when he should secure title to the land, is a property right within the provisions of the above statute, although an action is pending by the debtor against the bank for the enforcement of the right and the damages are unliquidated.

Where, in a suit in equity, under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, to reach and apply, in payment of a debt, a claim of the debtor to damages for a breach of a contract, which the debtor is seeking to enforce by an action at law, the bill alleges facts which, if proved, will establish such breach of contract and the defendant demurs, the truth of the facts so alleged are admitted by the demurrer and it is not open to the defendant to contend that the defendant in the action at law by the debtor contests liability and that his liability is not established.

It is immaterial to the maintenance of such a suit that the value of the claim of the debtor which the plaintiff seeks to reach and apply to the payment of his debt is uncertain, since it is of a nature that can be ascertained "by sale, appraisal or by . . . means within the ordinary procedure of the court."

An appeal from an interlocutory decree granting an injunction in a suit in equity cannot be brought before this court before final decree upon a report which relates only to the correctness of an interlocutory decree overruling a demurrer to the bill; and it therefore must be dismissed.

BILL IN EQUITY, filed in the Superior Court on May 11, 1917, and afterwards amended, by the trustees of the Associated Trust and the receiver of the Associated Trust appointed under a decree of the District Court of the United States for the District of Massachusetts against Fred F. Blanchard and the Fidelity Trust Company, seeking to reach and apply, in satisfaction of a debt alleged to be owed to the plaintiffs by the defendant Blanchard, a claim of Blanchard against the Fidelity Trust Company described in the opinion.

The material allegations of the bill as amended are described in the opinion.

An interlocutory decree was entered by order of Fox, J., granting an injunction to keep matters *in statu quo* pending final determination of the suit. From this interlocutory decree the defendant filed an appeal.

Later the defendant Blanchard demurred, as described in the opinion. The demurrer was heard by Fox, J., and was overruled; and the judge reported the case to this court for determination of the correctness of the order overruling the demurrer, with the provision that, if the order was correct, the defendant Blanchard should answer over, and, if the demurrer should be sustained, the bill was to be dismissed.

R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, reads as follows: "The Supreme Judicial Court and the Superior Court shall have original concurrent jurisdiction in equity of the following cases: . . . Suits by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without this Commonwealth, which cannot be reached to be attached or taken on execution in an action at law, although the amount of the debt is less than one hundred dollars or the property sought to be reached and applied is in the hands, possession or control of the debtor independently of any other person or cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court. In such suit, the interest of the defendant in partnership property may be reached and applied in payment of the plaintiff's debt; but unless it is a judgment debt, the business of the partnership shall not be enjoined or otherwise interrupted further than to restrain the withdrawal of

any portion of the debtor's share or interest therein until the plaintiff's debt is established; and if either partner gives to the plaintiff a sufficient bond with sureties approved by the clerk, conditioned to pay to the plaintiff the amount of his debt and costs within thirty days after it is established, the court shall proceed no further therein than to establish the debt; and upon the filing of such bond, any injunction previously issued in such suit shall be dissolved. Also suits to reach and apply shares or interests in corporations organized under the laws of this Commonwealth or of the United States, and located or having a general office in this Commonwealth, whether the plaintiff is a creditor or not, and whether the suit is founded upon a debt or not."

W. R. Bigelow, for the defendant Blanchard.

J. Noble, for the plaintiffs.

CROSBY, J. This is a bill in equity brought under R. L. c. 159, § 3, cl. 7, to reach and apply in payment of a debt due the plaintiffs from the defendant Blanchard, a right of action of Blanchard against the Fidelity Trust Company, the other defendant named in the bill. The defendant Blanchard demurred to the bill and assigned as causes of demurrer: because the plaintiffs have a plain and adequate remedy at law; because the bill as amended does not state a case which entitles the plaintiffs to relief in equity against him; because the court has no jurisdiction in equity; and because the claim set forth in paragraph two of the bill as amended is not such a claim as is comprised within the terms of cl. 7 of § 3 of c. 159 of the act. The presiding judge in the Superior Court overruled the demurrer, ordered an interlocutory injunction to issue as prayed for, and reported the case to this court.

The bill alleges that, in a suit in equity brought by the plaintiffs against Blanchard to recover the loss resulting from certain breaches of trust while acting as trustee for the Associated Trust, this court on May 10, 1917, entered a final decree charging the defendant with liability and ordering him to pay forthwith to John Noble as receiver of the Associated Trust the sum of \$4,571.21 with interest and costs of suit. The bill as amended alleges that the defendant has not paid the plaintiffs this sum or any part thereof.

It is plain that Blanchard's liability to the plaintiffs as established by the decree, is a "debt" within the meaning of the statute. *H. G. Kilbourne Co. v. Standard Stamp Affixer Co.* 216 Mass. 118.

The right which the plaintiffs seek to reach and apply is fully set forth in the second paragraph of the bill. In substance, it alleges that Blanchard has brought an action of contract against the Fidelity Trust Company to recover unliquidated damages from alleged breach of contract by the company, estimated in the sum of \$60,000; that the claim arises by reason of the agreement of the company to lend to Blanchard \$93,500, to be secured by a first mortgage upon certain real estate which Blanchard had an option from the owner to purchase; that the loan was to be made by the company to Blanchard when title thereto was so acquired by him; that Blanchard made demand upon the company for the amount agreed to be loaned, and offered to it a sufficient first mortgage upon the property; that the company finally refused to make the loan, and for this reason Blanchard was prevented from making the purchase and thereby lost substantial profits which would have accrued to him from the purchase; and also, that he spent much time and money in connection with the undertaking "for all of which, by reason of said breach of contract by the Fidelity Trust Company, he obtained no return, and suffered other and further damages."

It is plain that the right to recover unliquidated damages against the Fidelity Trust Company, vested in Blanchard, is a right which cannot be reached to be attached or taken on execution in an action at law. *Wilde v. Mahaney*, 183 Mass. 455, 459, 460. *Thayer v. Southwick*, 8 Gray, 229.

It remains to determine whether the right which the plaintiffs seek to reach is included in the phrase of the statute "any property, right, title or interest." It must be assumed that Blanchard has a valid claim against the Fidelity Trust Company even if the amount is uncertain. Such is the allegation of the bill, and the truth of the facts therein stated are admitted by the demurrer.

In *Alexander v. McPeck*, 189 Mass. 34, this court held that vested rights in equitable contingent remainders could be reached under R. L. c. 159, § 3, cl. 7. *Clarke v. Fay*, 205 Mass. 228. See also *Stockbridge v. Mixer*, 227 Mass. 501, 509, 510. It was held in *Lewenstein v. Forman*, 223 Mass. 325, that the interest of the insured under a fire insurance policy on a building, after the destruction of the building by fire but before the insurance company has elected whether it would rebuild the building or pay the loss,

is property which can be reached and applied in satisfaction of a debt of the owner, under R. L. c. 159, § 3, cl. 7.

Upon principle, as well as upon the authority of the cases above referred to, it seems plain that the right of Blanchard to recover damages against the Fidelity Trust Company is a property right: it is a valuable interest vested in him which can be reached and applied in a creditor's suit. We believe it was the intention of the Legislature that such a right as the plaintiffs seek to reach should be within the purview of the statute. It is a property right which he could alienate and would pass by assignment in insolvency or in bankruptcy. *Alexander v. McPeck*, *supra*. *Putnam v. Story*, 132 Mass. 205. *In re Harper*, 175 Fed. Rep. 412. It could have been applied in payment of a judgment debt under the poor debtor statute, R. L. c. 168, § 22.

The defendant Blanchard contends that there is no vested right in any definite sum or fund, but a disputed contract right in which the liability is denied and the damages are unliquidated. That Blanchard has a claim for damages must be assumed as it is alleged in the bill and admitted by the demurrer. For this reason the possibility that the Fidelity Trust Company may deny its liability is immaterial and cannot be considered. If upon the trial of that action the trust company prevails, the plaintiff's right to reach and apply will be valueless. But that possibility cannot affect the question whether the right of action is property which can be reached and applied under the statute.

While the property right is of uncertain value, there seems to be no reason why the value cannot, in the language of the statute, be ascertained "by sale, appraisal or by . . . means within the ordinary procedure of the court." The uncertainty as to the value of the right might affect the amount of any appraisal or the price for which it could be sold; but these considerations do not affect the nature of the claim or the right of the plaintiffs to reach it under the statute.

It follows that the demurrer was overruled rightly.

The appeal from the order directing the issuance of an interlocutory injunction is not properly here and is dismissed.

In accordance with the terms of the report the defendant is to answer over.

So ordered.

SALVATORE PIZZANO vs. ABRAHAM SHUMAN.

Suffolk. November 16, 1917. — January 9, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of one controlling real estate, Invited person. *Landlord and Tenant*, Landlord's liability to invitee of tenant. *Nuisance*.

At the trial of an action of tort against the owner of an apartment house for personal injuries received by a florist's errand boy who fell down steps leading to the basement of the apartment which in darkness and rain he mistook for the entrance to the building whither he was going on an errand to a tenant of the defendant, there was evidence tending to show that the first of the steps down which the plaintiff fell was within half an inch of the line of the public street, that there was no guard in front of the steps and that they were unlighted. It appeared that the defendant had control of the common entrance and passageways of the premises, that the tenant to whom the plaintiff was going on an errand had been a tenant at will of the apartment in the building for ten years and that the condition of the premises as to the steps in question had not been changed at all during his tenancy. *Held*, that, if it be assumed that the plaintiff was upon the premises on business for a tenant and thus by the implied invitation of the defendant, his rights while there were no greater than those of the tenant; that the duty of the defendant to the tenant as to the basement steps was merely to use due care to keep them in the condition in which they were or purported to be at the time of the letting, and that, on the evidence, there was no evidence of a failure to perform that duty.

In the above described action, it further was *held* that neither the fact that the defendant had a janitor on the premises who kept the hallways lighted, nor the fact that "there was a means of lighting that place [the basement steps] by night," was evidence tending to show that the defendant had assumed the obligation of lighting the steps.

In the above described case, it also was *held* that, since it appeared that, when injured, the plaintiff had ceased to be a traveller upon the highway, a violation by the defendant as to the steps in question of an ordinance of the city where the building was, providing that "No person shall maintain an entrance to his estate by steps descending immediately from or near the line of a public street, unless the same is securely guarded," was not evidence of negligence of the defendant.

Where the owner of a building used as an apartment house has permitted a condition which amounts to a nuisance to exist with respect to steps leading from a public street to a basement of the building and, while the nuisance is in existence, lets an apartment to a tenant, retaining control of the steps, if thereafter a person going upon the premises upon business with that tenant is injured by reason of the nuisance, such person cannot recover from the owner.

TORT for personal injuries received on November 19, 1914, when the plaintiff fell down steps leading to the basement entrance to a building owned by the defendant which in darkness and rain he mistook for the entrance to an apartment house numbered 491 on Beacon Street in Boston. Writ dated July 19, 1915.

In the Superior Court the case was tried before *O'Connell, J.* The material evidence is described in the opinion. At the close of the evidence on motion by the defendant and by order of the judge a verdict was ordered for the defendant. The plaintiff alleged exceptions.

Revised Ordinances of the City of Boston of 1898, c. 47, § 54, which was introduced in evidence by the plaintiff, so far as material to this action, provided that "No person shall maintain an entrance to his estate by steps descending immediately from or near the line of a public street, unless the same is securely guarded."

D. E. Hall & J. Gordon, for the plaintiff.

E. C. Stone, for the defendant.

CROSBY, J. This is an action to recover for personal injuries received by the plaintiff on November 19, 1914, by falling down the steps of a basement entrance to a building owned by the defendant. The building was four stories high, situated at the corner of Beacon Street and Massachusetts Avenue in Boston, and numbered 491 Beacon Street. The first floor was occupied as a drug store; the second, third and fourth floors were occupied by tenants of the defendant. The common entrance and passageways were in the defendant's control and possession, and the stairway where the plaintiff was injured had been maintained there since the building was constructed.

The plaintiff, at the time he was injured, was in the employ of a florist as errand boy and shipper. In the late afternoon of the day of the accident, he walked along Beacon Street intending to go to the apartment on the second floor of the building above referred to, which was occupied by Mrs. Lovett, to get a plant from her. In direct examination, he testified that it was raining and he carried an umbrella; that over the basement stairway there was a window which had a light in it "so it looked like 491 — it was very dark there — as if it was a concrete walk there,

and I went to walk in upon the step, and down I went into, — I landed on, — well, on the stone all the way down, . . . ”

The evidence shows that in the darkness he mistook the entrance to the basement for the main entrance to the building. There were nine steps to the basement entrance, each step being of stone and approximately nine inches in width. The building was set back some distance from the street line, and in front of the premises there was a grass plot enclosed by brown stone curbings, the first or top step setting out from the outer edge of the curbing a quarter of an inch toward the street line and within half an inch of the street line of Beacon Street; there was no guard in front of the steps leading to the basement.

The plaintiff introduced in evidence § 54 of c. 47 of the Revised Ordinances of the City of Boston of 1898 which was in force at the time the plaintiff was injured.

Upon this record, including the testimony of the plaintiff upon his direct and cross-examination, it is plain that before he was injured he had ceased to be a traveller upon the highway, and had turned off the sidewalk for the purpose of going along what he supposed was a concrete walk leading to the main entrance of the building. Such seems to be the only reasonable conclusion from his testimony, which is not contradicted by any other evidence in the record.

The question remains whether there was any negligence on the part of the defendant in the maintenance of the stairway.

Mrs. Lovett had occupied the apartment as a tenant at will for twelve years before July, 1916, when she moved. She was a tenant at will at the time of the accident. If we assume in favor of the plaintiff that he undertook to go upon the premises upon business with the tenant, and could be found to go there on an implied invitation of the defendant, still his rights against the defendant were no greater than those which Mrs. Lovett would have had under the same circumstances. *Alessi v. Fitzgerald*, 217 Mass. 576. *Mackey v. Lonergan*, 221 Mass. 296. The evidence showed that the condition of the stairway had remained the same during the twelve years that the apartment had been occupied by Mrs. Lovett, and thus had existed since the building was constructed both as to the absence of guards or railing and the failure to have it lighted. The testimony of Mrs. Lovett

that the defendant had a janitor on the premises who kept the hallways lighted, was not evidence that the defendant had assumed the obligation of lighting the basement stairway. Nor was the testimony of this witness that "there was a means of lighting that place by night," evidence which would warrant a finding that the defendant had undertaken to have it so lighted. There was no evidence to show that the stairway was not in the same condition at the time of the accident as it was at the time of the letting. The law upon this subject is settled by many decisions of this court. The landlord's duty in respect to such a stairway, is that of due care to keep it in such condition as it was in or purported to be in at the time of the letting. He is not bound to change the mode of construction. *Andrews v. Williamson*, 193 Mass. 92. *Domenicis v. Fleisher*, 195 Mass. 281. *Flanagan v. Welch*, 220 Mass. 186. *Fitzsimmons v. Hale*, 220 Mass. 461. *Mackey v. Lonergan*, *supra*.

As the plaintiff had ceased to be a traveller upon the highway when he was injured, the ordinance introduced in evidence was not evidence of negligence of the defendant.

Cases, relied on by the plaintiff, where the owners of buildings reserved to themselves the obligation of lighting common stairways and passageways, and have failed in that duty, whereby accidents have occurred and such owners have been found to be negligent, are clearly distinguishable from the case at bar. See *Marwedel v. Cook*, 154 Mass. 235; *Faxon v. Butler*, 206 Mass. 500.

If the stairway as maintained by the defendant could have been found to be a nuisance, still the defendant is not liable to the plaintiff, because, as stated in *Miles v. Janvrin*, 196 Mass. 431 at page 437, "it is not a tort as against the tenant for a landlord to demise to him premises in such a condition that they are a nuisance." See also *Bowe v. Hunking*, 135 Mass. 380; *Phelan v. Fitzpatrick*, 188 Mass. 237.

As there was no evidence of negligence of the defendant we need not consider whether the plaintiff was in the exercise of due care. It follows that a verdict rightly was directed for the defendant.

Exceptions overruled.

CATHERINE G. LITTLE, administratrix, vs. MASSACHUSETTS
NORTHEASTERN STREET RAILWAY COMPANY.

Essex. June 26, 1917. — January 10, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, &
CARROLL, JJ.

Pleading, Civil, Waiver of formal defect. *Negligence*, Proximate cause. *Proximate Cause*. *Witness*, Inference from failure to call. *Evidence*, Presumptions and burden of proof.

In an action, before the enactment of St. 1914, c. 553, against a street railway corporation by an administrator for causing the death of the plaintiff's intestate, the defendant, after having taken part in the trial of the case on its merits without objecting to the form of the declaration, cannot raise for the first time, at the argument before this court of its exception to the refusal of the presiding judge to order a verdict for it, the objection that the declaration contains no allegation that at the time of the injury that caused his death the intestate was in the exercise of due care.

In an action by an administrator for causing the death of the plaintiff's intestate by an injury due to the negligence of a servant of the defendant, if it appears that by reason of the negligence of the defendant's servant the plaintiff's intestate sustained an injury to his kidneys that was the immediate cause of his death which was hastened thereby from one to two years, a finding is warranted that the injury was the proximate cause of his death.

In an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate by reason of the carriage in which he was driving one horse and leading another being overturned when the defendant's motorman, as the plaintiff alleged, sounded the whistle on his car just as he was opposite the carriage and when the horses were frightened and were prancing and the intestate had held out his hand to warn the motorman of their condition of fright, there was evidence of a declaration of these facts by the intestate, and the controlling question of fact to be decided was whether the defendant's motorman sounded the whistle when his car was abreast of the frightened horses driven and led by the intestate. It appeared, upon the cross-examination of one of the defendant's witnesses, that the motorman who was operating the defendant's car at the time of the accident, and who no longer was in the defendant's employ, was downstairs in the court house "with the other witnesses," and the defendant asked the presiding judge to rule that "Upon all the evidence in this case no inference can be drawn against either the plaintiff or the defendant for failure to produce the motorman." The judge refused to make this ruling and left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call the motorman as a witness. *Held*, that the refusal of the judge to make the ruling requested and his instruction to the jury both were right.

The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him.

TORT by the widow of Edwin C. Little, late of Merrimac, as the administratrix of his estate, for conscious suffering and death of the plaintiff's intestate alleged to have been caused by the negligence of the motorman operating a street railway car of the defendant at about six o'clock in the afternoon of September 21, 1911, when the intestate was in a covered carriage driving one horse and leading another on the highway between Amesbury and Merrimac. Writ dated August 27, 1912.

In the Superior Court the case was tried before *Dana, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the presiding judge to order a verdict for it on the second count of the declaration, which was for causing the death of the intestate. The judge refused to order such a verdict for the defendant. The defendant's contentions upon its exception to this refusal are stated in the opinion. The defendant's other exception was to the refusal of the judge to make the ruling, requested by the defendant, that "Upon all the evidence in this case no inference can be drawn against either the plaintiff or the defendant for failure to produce the motorman of the car." The evidence referred to in this requested ruling and also the instruction of the judge to the jury in regard to it are stated in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$1,450 on the first count for conscious suffering and in the sum of \$2,000 on the second count for causing death. The defendant alleged exceptions.

The case was submitted on briefs in June, 1917, and afterwards was submitted on briefs to all the justices.

J. J. Ryan, for the defendant.

E. S. Underwood, for the plaintiff.

DE COURCY, J. The first count in the declaration was for the conscious suffering, and the second count was for the death of Edwin C. Little, the plaintiff's intestate, both alleged to be due to the negligence of the defendant's motorman.

1. At the close of the evidence the defendant moved that a verdict in its favor be directed on the second count. In support of that motion it now is argued that this count contained no allegation that Little was in the exercise of due care. It seems quite apparent that the absence of this allegation was not called to the

attention of the presiding judge, and that the case was tried on the assumption that the pleadings were in the usual form. The omission, if disclosed, doubtless would have been cured by an amendment. The defendant saw fit to try the case on the merits in the trial court and cannot take advantage of this objection by raising it for the first time in this court.

The further argument in support of its motion for a directed verdict is, that the evidence did not warrant a finding that the accident to Little on September 21, 1911, was the cause of his death. There was evidence that the immediate cause of death was an injury to the kidneys caused by the accident, and that the accident hastened the death of Little from one to three years. This was enough legally to warrant the jury in finding that the accident was the proximate cause of his death. *Wiemert v. Boston Elevated Railway*, 216 Mass. 598. *Walker v. Gage*, 223 Mass. 179.

Plainly there was evidence that Little exercised due care and that the defendant's motorman was negligent, and the defendant does not argue to the contrary. *Ellis v. Lynn & Boston Railroad*, 160 Mass. 341. *Partridge v. Middlesex & Boston Street Railway*, 221 Mass. 273.

2. The other exception is to the judge's refusal to give the following instruction, requested by the defendant: "Upon all the evidence in this case no inference can be drawn against either the plaintiff or the defendant for failure to produce the motorman." The testimony presented by the plaintiff had tended to show the following facts: On September 21, 1911, at about six o'clock in the afternoon, Little was driving from Amesbury to Merrimac in a covered carriage, driving his own horse and leading another. He was proceeding down Pond Hill, on the right side of the road, when an open car of the defendant came down the hill on the left side of the road. As the car came round a curve, about two hundred and fifty feet behind the carriage, the whistle was blown several times. The horses became frightened and pranced and so continued as the car approached them from behind. Little held out his hand to warn the motorman; but when the car got opposite the carriage the motorman sounded the whistle again and the horses jumped and overturned the carriage.

The defendant called as witnesses to the accident three pas-

sengers and the conductor of the car, who no longer was in its employ. The passengers did not remember any blowing of the whistle and the former conductor testified that the car whistle was blown once before the horses came in sight, but that he did not remember whether it was blown afterwards.

The cross-examination of one of the defendant's witnesses disclosed the fact that Bailey, the motorman of the car, was downstairs in the court house "with the other witnesses." The claim agent testified that Bailey was a witness at the last trial of the case, and that he had not been in the employ of the company since May, 1915. The defendant rested its case without calling Bailey as a witness.

In this state of the evidence a majority of the court are of the opinion that the judge rightly refused to give the instruction requested. The controlling question of fact was, Did the motorman sound the whistle when the car was abreast of the frightened horses? The plaintiff had introduced the declaration of Little in the affirmative and thus established a *prima facie* case of liability. The jury well might expect the defendant to meet that testimony if it was not true by producing Bailey, the only living witness who was able to contradict it, it appearing that it was in the power of the defendant to call him. In *McKim v. Foley*, 170 Mass. 426, 428, it was said by Field, C. J.: "The practice of permitting counsel to comment on the failure of the opposing party to call witnesses to facts needs to be used with caution, and such comment should be permitted only where it appears that the witnesses could have been produced, and that it is a fair inference from the conduct of the party, under all the circumstances, that he knew or believed that the testimony of the witnesses would be adverse, and for that reason did not produce them." The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him. If the state of the evidence is such that the burden devolves upon one party of meeting a fact as to which the other party has made out a *prima facie* case, and the testimony of the absent witness would be material on that issue, and he is available to the party that reasonably would be expected to call him, then the determination of what, if any, inference should be drawn from his absence is for the jury. *Lothrop v. Adams*, 133 Mass.

471, 477. *Tully v. Fitchburg Railroad*, 134 Mass. 499. *Harriman v. Reading & Lowell Street Railway*, 173 Mass. 28, 38. *McKim v. Foley*, *supra*. *Fletcher v. Willis*, 180 Mass. 243. *D'Addio v. Hinckley Rendering Co.* 213 Mass. 465. *Estes v. Aaron*, 227 Mass. 96, 100.

In *Fitzpatrick v. Boston Elevated Railway*, 223 Mass. 475, relied on by the defendant, the absent motorman had been discharged by the railway company previous to the first trial, had testified for it at the first and second trials, and at the third for the plaintiff. It did not appear that it was the duty or within the power of either party to produce him in court, "or even that he was alive."

In the present case the presiding judge rightly left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call Bailey as a witness. And the defendant makes no complaint of the instructions actually given.

Exceptions overruled.

TREASURER AND RECEIVER GENERAL *vs.* CHARLES SERMINI.

Suffolk. November 12, 1917. — January 11, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Pauper. Parent and Child. Husband and Wife. Insane Person. Commonwealth. Venus.

Under R. L. c. 81, § 10, and St. 1909, c. 504, § 82, the Treasurer and Receiver General may recover in an action against a father, living in this Commonwealth and of sufficient ability, for the support in a State hospital for the insane of his daughter, who at the time of her committal was more than twenty-one years of age and was married to a man then living in this Commonwealth and continuing to reside here.

In such an action the erroneous admission, subject to the defendant's exception, of evidence, offered and introduced by the plaintiff, that the husband of the insane person was not of sufficient ability to pay for her support, does not harm the defendant, as he would have been none the less liable if it had appeared that the husband of his daughter was of sufficient ability to support her.

It also was *said* that, although the Treasurer and Receiver General was not bound to resort to his remedy against the husband if of sufficient ability to support his wife, he was at liberty to do so.

In the case above described, where the action, being a civil action in which money due to the Commonwealth was sought to be recovered, properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither

lived nor had his usual place of business in that county, it was *said* that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise the objection either by a plea or answer in abatement or by a motion to dismiss.

CONTRACT under St. 1909, c. 504, § 82, by the Treasurer and Receiver General, at the request of the State board of insanity, to recover for the support of the defendant's daughter Lena Morin at the price of \$2.50 a week at the Northampton State Hospital for the insane. Writ dated March 31, 1915.

In the Superior Court the case was heard by *O'Connell, J.*, without a jury. The essential facts found by him are stated in the opinion.

The plaintiff offered evidence to prove that Eugene W. Morin, the husband of Lena Morin, had no property at the date of the writ or at the time of the trial and was not then of sufficient ability to pay for the support of his wife and that there was no reasonable prospect of Morin accumulating property which could be levied upon to satisfy any judgment which might be obtained against him for such support. The defendant objected to the admission of this evidence. The judge stated that he would admit the evidence *de bene*, and, if he finally decided that the evidence was competent, its admission should be subject to the defendant's exception. The evidence was admitted and the judge made findings based on it, including findings that Eugene W. Morin had no property and that there was no reasonable prospect of his accumulating property which could be levied upon to satisfy any judgment that might be obtained against him for the support of his wife in the hospital.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the facts and the law, the plaintiff is not entitled to recover and the verdict must be for the defendant.

"2. Under St. 1909, c. 504, § 82, the Treasurer and Receiver General cannot recover for the support of an insane person who is an adult married woman from any of the kindred of such person while her husband is living in the Commonwealth.

"3. A father is not 'bound by law' to support his adult daughter except she be a pauper and then only under the provisions of the statutes in such case provided."

The judge refused to make either of these rulings and ruled

that the defendant was liable. He found for the plaintiff in the sum of \$404.23; and the defendant alleged exceptions.

R. L. c. 81, §§ 9, 10, are as follows:

"Section 9. A pauper, his executor or administrator shall be liable in an action of contract to a city or town in which he has a settlement for expenses incurred by it for his support.

"Section 10. The kindred of such poor persons, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living in this Commonwealth, and of sufficient ability, shall be bound to support such poor persons in proportion to their respective ability. The mother shall be under the same legal obligation to support her pauper children as the father, but she shall not be liable to criminal prosecution for the enforcement of such obligation."

St. 1909, c. 504, § 82, is as follows: "The price for the support of inmates, other than State charges, of the institutions mentioned in section fourteen, and of the Massachusetts School for the Feeble-Minded, shall be determined by the trustees of the respective institutions. The price for the support of State charges shall be determined by the State board of insanity at a sum not exceeding five dollars per week for each person, and may be recovered by the Treasurer and Receiver General from such persons if of sufficient ability, or from any person or kindred bound by law to maintain them. The Attorney General shall upon request of the said board bring action therefor in the name of the Treasurer and Receiver General."

H. C. Joyner, for the defendant.

H. C. Atwill, Attorney General, & *H. W. Barnum*, Assistant Attorney General, for the plaintiff, submitted a brief.

CROSBY, J. This is an action at law brought by the plaintiff in his official capacity under St. 1909, c. 504, § 82, to recover for the Commonwealth certain charges for the support of one Lena Morin, while she was an inmate of one of the State hospitals for the insane. A judge of the Superior Court has found certain facts, admitted by both parties at the trial, which are sufficient to establish liability, if, as matter of law, the defendant can be charged for the support so furnished.

The inmate died in the hospital on December 24, 1914. She was a daughter of the defendant, and on the date of her committal

was more than twenty-one years old and was legally married to one Eugene W. Morin, who was living in this Commonwealth at the time of her committal and has ever since resided here. It is agreed that the defendant is of sufficient ability to pay for the support furnished at the rate charged, and that due demand was made upon him therefor before the bringing of this action. It is his contention that he is not liable for the support of his adult married daughter either at common law or by virtue of any statute.

Whatever the rule of the common law in England may be, it is settled in this Commonwealth that, in the absence of any statute, a father if of sufficient ability is bound to support his minor children. *Dennis v. Clark*, 2 Cush. 347, 352. *Gleason v. Boston*, 144 Mass. 25, 26. It is also true that at common law no obligation rested upon a father to support his adult married daughter or adult son; but nearly a century and a quarter ago a statute was enacted in this Commonwealth which greatly enlarged and extended the common law liability for the support of poor and indigent persons. This statute, enacted in 1793, by c. 59, § 3, provided, in part, that the kindred of any poor person "in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living within this Commonwealth, of sufficient ability, shall be holden to support such pauper in proportion to such ability." This statute in all material respects has remained unchanged and is now to be found in R. L. c. 81, § 10. *Gleason v. Boston*, 144 Mass. 25. Under Gen. Sts. c. 70, § 4, of which R. L. c. 81, § 10, is a substantial re-enactment, a father was held liable for the support of his adult pauper daughter, if of sufficient ability to contribute to such support. *Templeton v. Stratton*, 128 Mass. 137.

In the course of time, as the number of the insane and of persons otherwise deficient increased and it became necessary that they should be cared for in institutions established and maintained by the Commonwealth, statutes were enacted under which the Commonwealth was allowed to recover from cities and towns for the support so furnished, with a right on the part of such cities and towns to recover the amount so paid from the "kindred obligated by law to maintain" such persons, if of sufficient ability. Gen. Sts. c. 73, §§ 24, 25. By St. 1862, c. 223, § 11, the wording of the statute was changed with reference to the Commonwealth to its

present phrase, "any person or kindred." Pub. Sts. c. 87, § 32. R. L. c. 87, § 78. Under R. L. c. 87, § 79, cities and towns were released from the support of the poor insane and that expense was assumed by the Commonwealth, after January 1, 1904.

The question then is, who are the persons or kindred "bound by law to maintain" insane persons so supported? We cannot doubt that they are the relatives specified in R. L. c. 81, § 10. *Brookfield v. Allen*, 6 Allen, 585, was an action brought against a husband to recover for the support of his wife in a State insane asylum. When she was committed her residence was in Spencer; that town by Gen. Sts. c. 73, § 23, was obliged to pay, and did pay, for her support in the asylum; as her settlement was in Brookfield, that town by § 25 of the same chapter, was obliged to reimburse the town of Spencer, and having done so sought indemnity from the defendant. It was held that, while the action could not be maintained under Gen. Sts. c. 73, § 25 (which makes the insane person's "kindred obligated by law to maintain him, shall be liable for all such expenses paid by any city or town") because the word "kindred" includes only blood relatives, yet the defendant was liable at common law for the support of his wife. It was also held that "the 'kindred obligated by law' are manifestly those only who, by Gen. Sts. c. 70, § 4, are made chargeable for the support of poor persons, namely, the 'kindred in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity.'" Accordingly it would seem that the defendant in the case at bar comes within the literal terms of the statute, as it is plain that the phrase "kindred obligated by law to maintain" in Gen. Sts. c. 73, § 25, refers to the same persons as "any person or kindred bound by law to maintain" found in St. 1909, c. 504, § 82. If so, the kindred bound by law to maintain are those persons specified in R. L. c. 81, § 10.

The fact that the insane person was married and that her husband was lawfully bound to support her cannot exempt the defendant from liability. There is no provision under R. L. c. 81, § 10, which excepts a father from liability for the support of his daughter as a pauper if she is of full age or is married, nor can such an exception be read into the statute, which was intended greatly to enlarge and extend the common law liability of relatives of paupers for their support. As the plaintiff argues, it is not prob-

able that the Legislature intended the liability of parents should terminate on the marriage of their children when they are made liable for the support of the grandchildren, the offspring of such marriage. In *Fairhaven v. Howland*, 216 Mass. 149, which was an action to recover against a grandparent for the support of his grandchild as a pauper, under R. L. c. 81, §§ 10, 11, this court said at page 151, "If the child's parents had been living, and the need had arisen, the defendant would still have been liable."

The contention of the defendant that the plaintiff cannot maintain an action at law but is limited to a suit in equity under R. L. c. 81, § 11, cannot be sustained, as the remedy under which the plaintiff seeks to recover is not under R. L. c. 81, § 11, but is under St. 1909, c. 504, § 82. *Arlington v. Lyons*, 131 Mass. 328, 330, 331.

The evidence, admitted subject to the defendant's exception, tending to show that the husband of the insane person was not of sufficient ability to pay for the support of his wife, becomes immaterial in view of the conclusion which we have reached; the defendant was not harmed by the evidence as he would have been liable in this case even if it had appeared that the husband was of sufficient ability to support his wife. The plaintiff was not bound to seek his remedy against the husband, although he was at liberty to do so. *Fairhaven v. Howland*, *supra*.

The defendant also argues that the action was improperly brought in Suffolk County and should have been brought in the county of Berkshire where the defendant lives. Ordinarily, a defendant can take advantage of a wrong venue only by plea or answer in abatement, or by motion to dismiss if the error appears on the record, and the question is raised before a trial is had on the merits. *Murphy v. Merrill*, 12 Cush. 284. *Brown v. Webber*, 6 Cush. 560, 563. However, failure on the part of the defendant to plead in abatement or move to dismiss did not harm him, as R. L. c. 167, § 4, provides: "A civil action in which the Commonwealth is plaintiff or in which money due to the Commonwealth is sought to be recovered may be brought in the county in which the defendant lives or has his usual place of business, or in the county of Suffolk."

As the defendant's requests for rulings could not properly have been granted, the entry must be

Exceptions overruled.

TRIMOUNT LUMBER COMPANY vs. ALBERT B. MURDOUGH.

Middlesex. December 7, 1917. — January 11, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach. Sale, Warranty, Notice of claim for damages by buyer after acceptance of goods. Sales Act. Waiver. Damages, In recoupment. Practice, Civil, Exceptions, Verdict.

In an action of contract for the price of certain lumber, the defendant filed an answer in recoupment alleging that the lumber was not delivered within the time required by the contract. All the lumber delivered had been accepted by the defendant. For more than a year after the last delivery no claim was made by the buyer of damages for non-fulfilment of the contract "other than a notification twice repeated that if" a certain part of the lumber "was not delivered promptly the defendant would buy it in the Boston market," and it appeared that the part of the lumber in question might have been bought in the Boston market at the time when the buyer asked for the lumber and accepted it from the seller. The presiding judge instructed the jury that, if the buyer claimed to have been damaged through delay in delivering or lack of quantity or quality of which he knew or ought to have known, and failed within a reasonable time after acceptance to notify the seller that he claimed damages, although particular defects need not be specified, he could not recover, even if he had suffered damage from a breach of the contract. The jury found for the plaintiff seller for the full amount of the price claimed with interest and with no deduction for recoupment. *Held*, that the instruction of the judge was in conformity with the provisions of the sales act contained in St. 1908, c. 237, as well as with the common law before its passage, and was right.

In the same case it was *said* that, the facts not having been in dispute, the question, whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time, not having been raised at the trial, need not be considered by this court.

In the case above described, it also was *held*, that the verdict of the jury for the plaintiff in the full amount claimed was a conclusive finding that the defendant was entitled to no damages in recoupment because he had failed to give notice of his claim within a reasonable time, and therefore exceptions of the defendant to the exclusion of evidence which he contended was admissible to show the amount of the damages suffered by him became immaterial.

CONTRACT for \$730.52, with interest, upon a contract in writing made by letter for the price of certain lumber sold and delivered to the defendant. Writ dated August 16, 1911.

The defendant's answer, besides a general denial and an allegation of payment, contained the following: "Further answering

the defendant says that the plaintiff agreed to deliver the lumber under the contract as it should be required by the defendant for the use in the building, to wit, the Classical High School, at Lynn, which the defendant, to the plaintiff's knowledge, contracted to erect at that time in the city of Lynn; and the defendant says that the plaintiff did not make the shipments on time, and as the lumber was required to be used in the building; and the defendant says that by reason thereof he was greatly damaged, and is, therefore, entitled to recoup in this action."

In the Superior Court the case was tried before *Wait, J.* The essential facts shown by the evidence and the instructions of the judge upon the defendant's claim in recoupment are stated in the opinion. A part of that portion of the charge was as follows:

"In other words, you can accept goods and if you accept them you are bound to let the man that sold them to you know of any claim you are going to make against him within a reasonable time after you know you are going to make the claim or ought to have known that the breach you claim is in existence.

"Now, that is important in this case, gentlemen. If these goods were not up to the contract, if they were less in amount than they ought to have been, or if the delay in their delivery was such as to cause damage, it was up to the defendant if he proposed to accept the goods to give notice of that claim within a reasonable time, and if he did not, no matter whether his claim is good, bad or indifferent, he cannot maintain it, and it is a question for you in this case if there was any right which the defendant had on account of any breach of the contract through delay in delivery or through lack of quantity or quality, whether if he knew of it he made a claim within a reasonable time."

The jury returned a verdict for the plaintiff in the sum of \$1,028.18; and the defendant alleged exceptions.

J. H. Vahey, (P. Mansfield with him,) for the defendant.

C. P. Sampson, for the plaintiff.

BRALEY, J. It appears from the correspondence between the parties, that the plaintiff's predecessor, to whose rights it has succeeded, contracted to deliver, free on board at the place of shipment, a certain quantity of "long leaf merchantable hard pine," the sizes of which were specified on schedules, which were to be used for the first floor of the high school building in process

of erection by the defendant. The contract being by letter, its terms and construction were for the court, and there can be no doubt that it called for all lumber furnished to be of "long leaf merchantable hard pine" of the sizes specified, which words are not only descriptive of what the defendant bought, but constitute a warranty of the kind, quality and size. *Fullam v. Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476, and cases cited. It was contended by the defendant, who had pleaded in recoupment, that as the material was not of the "size and character called for" he was entitled to damages. But the exceptions unequivocally recite "that all the lumber delivered by the plaintiff was accepted by the defendant," and from the entire record, which includes the pleadings, it appears that while the last delivery was on March 23, 1910, no claim for damages for non-fulfilment "was down to April 1, 1911, ever given . . . other than a notification twice repeated that if the 3 x 14 material needed for the first floor was not delivered promptly the defendant would buy it in the Boston market." It is further stated "that this material could have been bought and supplied in Boston at any time from August 1, 1909, when asked for by the defendant, to November 1, 1909, when it had been accepted from the plaintiff and used by the defendant, and when all the lumber mentioned in the declaration had been delivered to the defendant. . . ." By § 49 of the sales act, St. 1908, c. 237, "In the absence of an express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." The presiding judge in instructing the jury said that, if the defendant claimed to have been damaged through delay in delivery or lack of quantity or quality of which he knew or ought to have known, and failed within a reasonable time after acceptance to notify the seller that he claimed damages, although particular defects need not be specified, he could not recover, even if he had suffered damages from the breach, and left to the jury the question whether under all the circumstances such notice had been given.

It is settled independently of the statute that acceptance of title does not as matter of law constitute a waiver by the buyer of claims against the seller for failure to deliver goods of the quality ordered. The question is for the jury. *Taylor v. Cole*, 111 Mass. 363. *Gilmore v. Williams*, 162 Mass. 351. *Borden v. Fine*, 212 Mass. 425, 427, 428. *Gascoigne v. Cary Brick Co.* 217 Mass. 302, 305. *McGrath v. Quinn*, 218 Mass. 27, 29. See Williston on Sales, § 485. But under the statute such claims are not enforceable unless notice to the seller has been given within a reasonable time. The law having been accurately stated, and the interpretation of the contract being unexceptionable, the defendant, although he excepted to the instructions, has no ground of complaint.

A notice, that if the material needed for the first floor was not delivered promptly the defendant would buy it elsewhere, is not notice of a breach of the contract for which damages would be claimed. The verdict for the plaintiff for the full amount with interest being conclusive of the defendant's failure to show compliance with the statutory condition, his exceptions to the exclusion of evidence which he contends was admissible on the question of damages to which he was entitled in recoupment have become immaterial and need not be determined.

We add to avoid any misconception that, the facts not being in dispute, the question whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time, not having been raised at the trial, has not been considered.

Exceptions overruled.

LOUIS E. FLETCHER vs. NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY.

Worcester. November 7, 1917. — January 12, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Validity, Waiver of performance of condition precedent. *Agency*,
Scope of authority. *Carrier*, Transportation of live stock. *Waiver*.

A contract in writing between the owner of a horse and a railroad corporation for the transportation of the horse by rail from one town to another, both in this Commonwealth, contained a provision that no claim for damages which may accrue to the shipper shall be allowed or paid by the carrier "unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the . . . agent of the said carrier, at his office in . . . within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner." *Held*, that this provision was not unreasonable and was a valid one binding upon the parties.

A contention, that the requirement, quoted above, of a notice within five days from the delivery of a horse of any claim for injury to the horse when in the hands of the carrier had been waived by the station agent of the carrier who was on the platform when the horse arrived and "appeared to have charge of the delivering and unloading of the cars," and who was "a freight and passenger agent at" that station, was *held* to be unfounded because it was not shown that the station agent had any authority to waive the requirement.

In the same case it was *said* that it was not necessary to consider whether the rule, that a carrier has no right to waive a provision in a contract for interstate transportation, which is filed with its tariff schedules, requiring a notice in writing within a certain time, applies to a similar provision in a contract for intrastate transportation, which has been filed in a like manner.

CONTRACT OR TORT for damages for an injury sustained on October 2 or 3, 1912, by a race horse belonging to the plaintiff, named Oom Paul, when being transported over the defendant's railroad from West Springfield to Palmer. Writ dated January 7, 1914.

The defendant's answer, in addition to a general denial, alleged that the horse was transported under the terms and conditions of a live stock contract filed with the interstate commerce commission as a part of the tariffs of the defendant filed with that com-

mission as required by the statutes of the United States, and containing the provision quoted in the opinion.

In the Superior Court the case was tried before *Dubruque*, J. In compliance with an order of the judge the plaintiff elected to rely on the second count of his declaration, which was in tort. The evidence is described in the opinion. At the close of the evidence the defendant, among other requests, asked the judge to make the following rulings:

"4. The plaintiff cannot recover for any loss or damage to his horse, unless he made a claim in writing, verified by affidavit, within five days from the time the horse was removed from the car at Palmer.

"5. The defendant's agent at Palmer had no authority to waive this requirement about presenting a claim in writing."

The judge submitted to the jury two special questions, which with the answers returned by the jury were as follows:

"1. Was the plaintiff's horse 'Oom Paul' injured in the course of transportation in the defendant's car through the defendant's negligence on October 2 or 3, 1912, between Northampton, Massachusetts, and Palmer, Massachusetts?" The jury answered, "Yes."

"2. If you answer yes, then what was the amount of damage suffered by the plaintiff resulting from the injury to said horse?" The jury answered, "\$364.91."

There was sufficient evidence to warrant the special findings of the jury upon the question of the defendant's negligence and the extent of the damage suffered. After the special verdicts were returned, upon motion of the defendant the judge ruled that as a matter of law the plaintiff was not entitled to recover and ordered the jury to return a general verdict for the defendant. He reported the case for determination by this court. It was agreed by the parties, that if there was material and competent evidence upon which the jury might have found that there was a waiver by the defendant of the five days' clause in the shipping contract, this court might treat the case as if the jury had found there was a waiver of the provisions of this clause by the defendant. If the ordering of the verdict was right, the verdict for the defendant was to stand. If the ordering of the verdict was wrong, a verdict was to be entered for the plaintiff for such amount as this court might deem proper.

The case was submitted on briefs.

A. M. Levy, for the plaintiff.

R. A. Stewart & J. W. Worthington, for the defendant.

CARROLL, J. The plaintiff seeks to recover damages for an injury to a horse which was to be carried from Northampton to Palmer on October 2, 1912, under a live stock contract signed by the plaintiff and the Boston and Maine Railroad. There was evidence that the car containing the horse was transferred to the defendant at Springfield and was taken to West Springfield, where the horse was injured by the negligence of the defendant sometime during that night.

The contract provided, "no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the . . . agent of the said carrier, at his office in . . . within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs." A witness "familiar with the tariffs, exceptions to official classification, official classification and live stock contract" applicable to the shipment of horses from Northampton to Palmer, testified that these publications were duly filed with the interstate commerce commission; that the rates were the same on interstate and intrastate traffic; that these publications were on file at the Boston and Maine Railroad freight station at Northampton, where they could be inspected by the public, if desired, and that notice to this effect was posted in the station. There was evidence that "there was no rule or regulation in force relating to freight claims or the handling or moving of freight that authorized the freight agent or station agent to waive the requirements of a live stock contract with reference to the necessity of a claim under oath being presented within five days of the delivery of the goods." No written demand was made upon the defendant within five days. On the morning of October 3, 1912, when the horse arrived at Palmer, the plaintiff "looked up

the railroad man on the freight house platform who appeared to have charge of the delivering and unloading of the cars," and after complaining to him of the damage to the horse and stating "he is entered here to race here tomorrow," this man told him to take the horse and "do everything he could to get the horse well and that they would pay him board and damages." There was further conversation and the plaintiff removed the horse. He testified that it was impossible to state the extent of the injury to the horse for several months, and that two or three months after this he wrote the agent at Palmer. One Whittemore, "a freight and passenger agent at Palmer," testified that the plaintiff on the morning of October 2, 1912, told him that one of his horses was badly injured and asked him what "he had better do about it." The agent replied he had "better take the best care of his horse" and to let him know the result. He did not consider that any claim had been made against the defendant and heard nothing further until the following March, when he received a letter from the plaintiff.

The plaintiff relied on the second count of his declaration. The jury found the horse was injured by reason of the defendant's negligence and assessed damages of \$364.91. The case is here on the report of the presiding judge.

The plaintiff contends that the stipulation of the contract requiring a claim for damage to be in writing, verified by the affidavit of the shipper and delivered to the carrier's agent within five days from the time of the removal of the horse from the car, is unreasonable and therefore invalid.

In an interstate shipment of live stock under a contract designated "Limited Liability Live Stock Contract," requiring a claim for damage to be made in writing, verified by the affidavit of the shipper and delivered to the carrier within five days from the time the stock is removed from the cars, it was held that the stipulation was a reasonable one and controlling on both the parties to the contract, the court saying: "We need not stop to consider whether the requirement of the live-stock contract that a claim for damages should be presented within five days from the time the stock was removed from the cars was reasonable or not, for this question has been answered in favor of the reasonableness of such stipulation." *Erie Railroad v. Stone*, 244 U. S. 332, citing

Northern Pacific Railway v. Wall, 241 U. S. 87, *St. Louis, Iron Mountain & Southern Railway v. Starbird*, 243 U. S. 592. The same rule should be applied in an intrastate shipment. The contract was equally binding on both parties, whether it had reference to interstate or intrastate commerce. The regulation as to time of notice was valid and the plaintiff should have complied with it.

Before the horse was removed the plaintiff knew it was injured, although he did not know the full extent of the injury. There was nothing to prevent him, within five days after the horse was taken from the car, from making the claim in the manner required by the contract of shipment. See *St. Louis, Iron Mountain & Southern Railway v. Starbird*, *supra*.

The plaintiff argues that the clause in the contract requiring notice in writing within five days was waived by the defendant and he relies on the conversation with "the railroad man on the freight house platform who appeared to have charge of the delivery and unloading of the cars" to prove this waiver. In *Metz Co. v. Boston & Maine Railroad*, 227 Mass. 307, it was decided that the carrier had no authority to waive the provisions of a contract requiring a written notice. In that case the shipment was made in interstate commerce. "Waiver by the railroad corporation of an obligation resting on the shipper or consignee would operate to that extent to create a preference in favor of that particular shipper or consignee and a discrimination against all others to whom a like concession is not made." It well may be that this rule and the reasons for it are appropriate both to an intrastate and interstate shipment, but we do not consider it necessary to decide this question as there was no evidence in the case at bar to show that the plaintiff was released from the terms of the contract by any authorized agent of the defendant. There is nothing to show that the person with whom the plaintiff talked when the horse was taken from the car had any authority, express or implied, to alter the written contract of the carrier, nor was he held out to the plaintiff as having such authority. Even if it could be found that the plaintiff talked with Whittemore "a freight and passenger agent at Palmer," he was not shown to have any such power. A station agent cannot bind his principal by admissions which in effect substitute a new agreement in place of the agreement of the parties

and deprive the defendant of the requirements of a written contract entered into by the shipper and the carrier. No such authority was given to the station agent and there was no rule or regulation permitting him to change the contract. See *Boston & Maine Railroad v. Ordway*, 140 Mass. 510; *Wellington v. Boston & Maine Railroad*, 158 Mass. 185; *Bachant v. Boston & Maine Railroad*, 187 Mass. 392, 396; *Angle v. Mississippi & Missouri Railroad*, 18 Iowa, 555.

The evidence admitted in *Lane v. Boston & Albany Railroad*, 112 Mass. 455, did not amount to a modification of the contract; it was merely the admission of the freight agent in the performance of his duty, when investigations were made concerning the loss of the freight demanded. See in this connection *Green v. Boston & Lowell Railroad*, 128 Mass. 221.

There is nothing in the plaintiff's contentions that the contract was defective because it "was unfilled and incomplete in many important places," and that the car containing the shipment was deviated from its intended route when it was transferred from the Boston and Maine Railroad to the yard of the defendant at West Springfield, under the principle established in *McKahan v. American Express Co.* 209 Mass. 270, and cases cited.

According to the terms of the report the verdict for the defendant is to stand.

So ordered.

FRANCESCO AGUGLIA *vs.* LUIGIA CAVICCHIA.

Suffolk. November 15, 1917. — January 12, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Eviction, Quiet enjoyment. *Pleading, Civil*, Declaration: matter of inducement. *Unlawful Interference*.

In an action by the lessee under a lease in writing of a building containing a store and four family suites, against his lessor for an alleged eviction, the plaintiff offered to prove that while the lease was in force the defendant had given notice in writing to all the subtenants in the building not to pay rent to the plaintiff and had collected a month's rent from one of the subtenants, receipting for it in the defendant's own name, that the defendant "procured" the subtenants "to attorn to" the defendant "as their landlord" and that the plaintiff, learn-

ing of this, wrote to the defendant and "removed from the suite which he occupied and surrendered the lease to the defendant." *Held*, that the evidence offered would not warrant a finding that the defendant had evicted the plaintiff, or had deprived him of the quiet enjoyment of the leased premises.

In the case stated above one of the counts of the declaration, after stating in effect that the defendant wrongfully interfered with the plaintiff's tenants and prevented them from paying rent to the plaintiff, asserted that by this means the defendant ousted the plaintiff, whereby he was evicted, and it was *held*, that the averments of unlawful interference were matters of inducement merely introductory to the allegation of ouster or eviction, which was the essential subject of the count on which the plaintiff relied, so that it was not necessary to consider whether the facts contained in the plaintiff's offer of proof would have supported a count for unlawful interference with the plaintiff's rights under the contract contained in the lease.

CONTRACT OR TORT by the lessee under a lease in writing dated September 28, 1912, for the term of two years from October 1, 1912, the declaration containing two counts, each for an alleged breach of the covenant of quiet enjoyment by an eviction of the plaintiff by the defendant, the lessor, as explained in the opinion. Writ dated August 22, 1913.

The second count of the declaration, which is described in substance in the opinion, contained the following allegations:

"That the defendant, who was the lessor named in said lease, wrongfully contriving and intending to injure the plaintiff and to deprive him of the benefit of his possession of said premises, and of the benefit of said lease, wrongfully interfered with certain subtenants of the plaintiff's of certain portions of said demised premises, and by misrepresenting and pretending to them, that the plaintiff's said lease was terminating or abrogating, or that the plaintiff had no rights thereunder, preventing the plaintiff's said subtenants from paying the rent due from them to the plaintiff for their said portions of said premises, and caused said tenants or some thereof to pay said rent to the defendant or her agent, and prevented the plaintiff from receiving the same.

"And the defendant by the means aforesaid caused the plaintiff's said subtenants to attorn to her, as their landlord in view of the rent, and thereby ousted the plaintiff from a large and material part of the demised premises, and rendered the plaintiff's occupation, use and enjoyment of the remainder of said premises of substantially no value to him, whereby the plaintiff was evicted from and compelled to remove and did remove from and vacate

and give up said premises to the defendant, who repossessed herself thereof.

"And the defendant has ever since excluded the plaintiff from all and singular the demised premises and denied his rights under said lease.

"By reason and by means whereof the plaintiff has wholly lost the benefit of said lease and of his rights thereunder, and the profits to which he was entitled per subletting said premises, and has been otherwise greatly damnified."

In the Superior Court the case was tried before *Hitchcock, J.* The plaintiff made in writing an offer to prove certain facts, which are stated in the opinion. The judge ruled that the facts offered to be proved were not sufficient in law to warrant a verdict for the plaintiff and ordered the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

J. W. Pickering, for the plaintiff.

F. P. Fralli & C. Grillo, for the defendant.

CARROLL, J. This action is brought by the lessee against his lessor. The declaration is in two counts. By the lease dated September 28, 1912, the premises were demised to the plaintiff for two years from October 1, 1912. The plaintiff offered to show that the premises consisted of a store and four family suites, that the plaintiff paid the rent to February 1, 1913, and on the same day the agent of the defendant received from one of the plaintiff's tenants the rent for one month, due on that day, and receipted for it in the defendant's name, that the defendant had written to this tenant forbidding him to pay rent to the plaintiff and had given like notice to the other tenants, all of whom refused to pay rent to the plaintiff, "who has never received any rent from any of said tenants, since that which accrued on February 1, 1913, although the plaintiff paid to the defendant on March 1, 1913, the rent which fell due under the lease on that day;" that the defendant represented to all the tenants that the plaintiff had no right to the premises and had "procured them to attorn to her as their landlord," and that the plaintiff, learning of this, wrote the defendant and "at the end of March, 1913, removed from the suite which he occupied and surrendered the lease to the defendant."

The first count of the declaration alleges that the plaintiff was evicted from the leasehold. The plaintiff's offer did not show the disturbance of his possession or that he was deprived of the beneficial enjoyment of the leasehold. The collection of the rent from the plaintiff's tenants and the notice forbidding them to pay any further rent to him were acts which did not constructively evict him from his estate. "To constitute an eviction . . . there must either be an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of it, to which he yields, abandoning the possession within a reasonable time." *Bartlett v. Farrington*, 120 Mass. 284. *Taylor v. Finnigan*, 189 Mass. 568. *Skally v. Shute*, 132 Mass. 367. *Royce v. Guggenheim*, 106 Mass. 201. The acts complained of did not amount to an eviction, as the offer of proof did not show that by his wrongful acts the landlord had deprived the tenant of the beneficial use and enjoyment of the whole or a part of the leasehold. *Taylor v. Finnigan, supra*. The plaintiff cannot recover under the first count.

The acts stated in the offer of proof, even if they constituted an interference with the rights of the plaintiff, were not equivalent to a breach of the covenant of quiet enjoyment. The defendant did not enter upon the land and repossess herself of her former estate, determining the estate of her lessee. The tenants were estopped to deny their landlord's title. They remained his tenants, for the reason that they were not ousted by one having a superior title, or compelled to yield to the lawful owner of a claim which could not be resisted, without entry on the premises by such owner. See in this connection *Hinckley v. Guyon*, 172 Mass. 412; *George v. Putney*, 4 Cush. 351; *Eddy v. Coffin*, 149 Mass. 463; *Morse v. Goddard*, 13 Met. 177; *King v. Bird*, 148 Mass. 572; *Casassa v. Smith*, 206 Mass. 69; *Groustra v. Bourges*, 141 Mass. 7. The offer of proof does not bring the case within *Holbrook v. Young*, 108 Mass. 83, where the defendants' lessors were themselves tenants at will of two stores, one of which they leased in writing to the defendants. After the execution of the lease the tenants at will became bankrupt. The reversioner thereupon entered and required the tenants to attorn to her, which they did, and it was there decided that these proceedings

terminated the tenancy of the tenant at will and constituted an eviction of the lessee, so that when they were sued for rent by the assignees of the bankrupt, the defendants could recoup for the breach of the covenant for quiet enjoyment.

Rejecting the immaterial matter alleged in the second count, the plaintiff, after stating in effect that the defendant wrongfully interfered with his tenants and prevented them from paying rent to the plaintiff, asserts that by such means the defendant thereby ousted the plaintiff, whereby he was evicted. For the reasons stated, there was no eviction or ouster, and on the offer of proof there can be no recovery on the second count. Some of the allegations of this count would indicate that the plaintiff was seeking to recover on the ground of an intentional and unjust interference with an existing contract. See *McGurk v. Cronenwett*, 199 Mass. 457; *Wheeler-Stenzel Co. v. American Window Glass Co.* 202 Mass. 471; *Beekman v. Marsters*, 195 Mass. 205.

We do not decide that the averments of this count standing alone, were sufficient, together with the offer of proof, to entitle the plaintiff to recover under the principle of the above cases. These averments of unlawful interference were matters of inducement, introductory to the statement of the eviction or ouster of the plaintiff, which was the principal subject of the count and the one upon which he relied, and which is merely explained by the introductory matter describing the unlawful interference with the plaintiff's contract rights.

Exceptions overruled.

BOSTON SAFE DEPOSIT AND TRUST COMPANY, executor, vs.
WALDO REED, executor, & others.

Suffolk. November 21, 1917. — January 12, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Devise and Legacy, To individuals or to a class, General or specific, Of stocks and bonds.

Unless it is clear that a testator intended that the persons named in his will as the legatees of a fund should take the fund as a gift to them and the survivors of them as a class, a gift by will of a sum of money to be distributed equally among

certain legatees described by name is a separate gift to each of the legatees named, and if one of them dies before the testator, leaving no issue, the legacy to such legatee lapses and, if there is a residuary clause in the will, falls into the residue of the testator's estate.

A codicil to the will of a testator contained the following provision: "I give and bequeath unto my said cousins A A G, M E W and C N W, and to the issue of said W T S, stocks and bonds to the amount of one hundred thousand dollars, to be equally divided between them, the issue of said W T S taking the share he would have taken, if living." The testator had inherited about \$75,000 from his father and the persons named in the provision quoted above were his only cousins on his father's side. The codicil contained a residuary clause. C N W, one of the cousins named, died before the testator, leaving no issue. *Held*, that the legacy to C N W of stocks and bonds to the amount of \$25,000 lapsed and that the amount that had been bequeathed to him fell into the residue of the testator's estate, leaving stocks and bonds to the amount of \$75,000 to be distributed among the other legatees designated in the provision quoted above. In the case stated above it appeared that the testator at the time of his death owned stocks and bonds in excess of \$100,000 in value, and it was *held* that under the provision quoted above the legacy of "stocks and bonds to the amount of one hundred thousand dollars" was a general and not a specific bequest and that the legatees were entitled to receive stocks and bonds equal to the amounts of their respective legacies at the fair market value of the securities at the time of their transfer.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 13, 1917, by the Boston Safe Deposit and Trust Company, a corporation, as the executor of the will of Andrew R. Winslow, late of Boston, for instructions.

The case came on to be heard by *Crosby, J.*, upon the pleadings and an agreed statement of facts. The clause of the codicil to the will of the testator which was to be interpreted is quoted in the opinion. Among the agreed facts were the following:

Andrew R. Winslow, the testator, was the only son of John B. Winslow and Polly Robinson Winslow. At the time of her marriage to the testator's father the testator's mother had no independent means of her own. The testator's father died on February 12, 1890, intestate and a widower, leaving property worth approximately \$75,000, and on March 17, 1890, the testator was appointed the administrator of his father's estate, giving a bond approved by the Probate Court for Suffolk County in the amount of \$100,000.

On April 12, 1890, the testator made the will referred to in the bill.

Both at the time of the death of John B. Winslow and on April

12, 1890, Amelia A. Greene, Mary E. Whitaker, Charles N. Winslow, and Wanton T. Sherman, the legatees mentioned in the first paragraph of the will, constituted the testator's only living first cousins on his father's side.

On October 21, 1904, the testator executed a codicil to his will, which was referred to in the bill and contained the provisions quoted and described in the opinion.

Of the first cousins of the testator named in the first clause of the will Wanton T. Sherman died after the will was drawn and before the codicil was executed, leaving two sons and two daughters. The daughters died, never having married and intestate, after the execution of the codicil but before the death of the testator, so that the only issue of Wanton T. Sherman living at the time of the testator's death were his sons, the defendants Joseph B. Sherman and Henry W. Sherman.

Mary E. Whitaker, mentioned in the first paragraph of both the will and the codicil, died on June 11, 1906, intestate, leaving no husband, and as her only heir at law Josephine W. Whitaker, who was appointed administratrix of her mother's estate on September 4, 1906. The testator knew of her death.

Charles N. Winslow died on December 29, 1904, leaving a widow, Henrietta E. Winslow one of the defendants, who was appointed executrix of his will on February 6, 1905. Charles N. Winslow left no issue, no father, mother, brother, sister, nephew or niece. The testator was thus one of his next of kin at the time of his decease.

The testator died on January 21, 1916, never having married, leaving an estate appraised at \$226,374.42, and, surviving him, in addition to Amelia A. Greene, Josephine W. Whitaker, Joseph B. Sherman, and Henry W. Sherman, hereinbefore mentioned, who then constituted, with the exception of the children of Amelia A. Greene, the only living descendants of Andrew Winslow, the testator's paternal grandfather, his second cousin George F. Winslow, and as his only heirs at law and next of kin on his mother's side certain first cousins.

A list of the stocks and bonds included in the estate of the testator at the time of his death was appended to the agreed statement of facts. Their value as appraised in the inventory of the testator's estate was \$131,458.75.

E. Higginson, for the defendant Waldo Reed.

C. J. Danaher (of Connecticut), for the defendant Joseph B. Sherman.

J. G. Brackett, for the defendant Josephine W. Whitaker.

J. A. Locke, for the Boston Safe Deposit and Trust Company as trustee.

M. Levy (of Rhode Island), for the defendant Henry W. Sherman, submitted a brief.

CARROLL, J. The main question involved in this bill for instructions as to the construction of the will of Andrew R. Winslow is, whether in the first article of the codicil to his will he gave to Amelia Ann Greene, Mary Elizabeth Whitaker, Charles N. Winslow and the issue of Wanton T. Sherman one bequest to them as a class or separate bequests to each of them. Charles N. Winslow having died after the date of the codicil and before the death of the testator, leaving no issue, his legacy lapsed and passed into the residue, if it was a separate legacy. R. L. c. 135, § 21. *Howland v. Slade*, 155 Mass. 415. If the gift was to a class, the legacy of Charles N. Winslow went to the survivors.

The first article of the testator's codicil to his will provided that, "Whereas in my said will by the first clause thereof I did give and bequeath all my stocks and bonds and money in savings banks to be equally divided between my cousins Wanton T. Sherman, Amelia Ann Greene, Mary Elizabeth Whitaker and Charles N. Winslow; . . . and whereas said Wanton T. Sherman has since died, leaving issue; I therefore hereby revoke said first clause of said Will, and in place thereof I give and bequeath unto my said cousins Amelia Ann Greene, Mary Elizabeth Whitaker, and Charles N. Winslow, and to the issue of said Wanton T. Sherman, stocks and bonds to the amount of one hundred thousand dollars, to be equally divided between them, the issue of said Wanton T. Sherman taking the share he would have taken, if living."

It is a well recognized rule that when there is a gift to several legatees described by name, of an aggregate sum to be divided equally among them, if one dies before the testator, his share will lapse. *Emerson v. Cutler*, 14 Pick. 108, 114. *Workman v. Workman*, 2 Allen, 472. *Best v. Berry*, 189 Mass. 510. *Sohier v.*

Inches, 12 Gray, 385. *Dresel v. King*, 198 Mass. 546. *Worcester Trust Co. v. Turner*, 210 Mass. 115.

This rule will not be enforced when it is clear that the testator intended that the persons named were to take the fund bequeathed as a class and not as individuals, and the survivors of the legatees named should take the whole fund bequeathed. *Best v. Berry*, *supra*, and cases cited.

Where the recognized rule has not been followed, it will generally be found that the testator, taking the will as a whole, manifested an intention to give one fund to a single class or group of persons and did not intend a gift to each one individual absolutely, that he had in mind, not the individuals of the class, but the class itself as the object of his bounty, and intended to benefit all of the class who were left at his death rather than to benefit them individually, the court in such cases, deciding that the legacy was to a class, merely carried out the intention of the testator. *Schaffer v. Kettell*, 14 Allen, 528. *Stedman v. Priest*, 103 Mass. 293. *Meserve v. Haak*, 191 Mass. 220. *Loring v. Coolidge*, 99 Mass. 191. *Jackson v. Roberts*, 14 Gray, 546. *Smith v. Haynes*, 202 Mass. 531.

The fact, that the testator inherited a certain sum from his father and that the legatees mentioned in the first clause of the codicil were his only cousins on his father's side, is not enough, together with the other facts and circumstances stated in the agreed facts, to overcome the presumption that the gift was to the legatees as individuals.

The legatees were ascertained and described by name and were not so mentioned merely for the purpose of fixing the class membership. The testator gave to certain persons by name, who were so designated as to be fixed at the time of the gift. It was a legacy to them as individuals and not to them as a class, and the legacy to Charles N. Winslow therefore passed to the trustee under the twelfth article of the codicil. It follows that the legacy of \$100,000 is to be divided as follows: \$25,000 is to be paid to Josephine W. Whitaker daughter of Mary Elizabeth Whitaker, \$25,000 is to be paid to the executor of the will of Amelia Ann Greene, \$25,000 is to be paid in equal shares to Joseph B. Sherman and Henry W. Sherman, the issue of Wanton B. Sherman, and \$25,000 is to be paid to the plaintiff under the twelfth

clause of the codicil as a part of the residue of the testator's estate.

In the first article of the codicil the testator bequeathed stocks and bonds to the amount of \$100,000 to the legatees there mentioned. This was a general and not a specific bequest. *Johnson v. Goss*, 128 Mass. 433. *Parker v. Cobe*, 208 Mass. 260. At the time of his death the testator owned stocks and bonds in excess of \$100,000. The legatees, therefore, are entitled to stocks and bonds equal to the amount of their legacies at their fair market value as of the time of the transfer, *Thayer v. Paulding*, 200 Mass. 98, *Fisk v. Cushman*, 6 Cush. 20, 27, 28, with interest on the amount due them from January 21, 1917, one year after the death of the testator, at the rate of four per cent per annum, to the time of the transfer to them of the stocks and bonds. St. 1915, c. 151, § 2. See *Gilbert v. Bachelder*, 223 Mass. 329; *Daniels v. Benton*, 180 Mass. 559; *Ogden v. Pattee*, 149 Mass. 82; *Kent v. Dunham*, 106 Mass. 586.

Plaintiff to be instructed accordingly.

MARTIN TUTTLE vs. METZ COMPANY & trustee.

Suffolk. November 23, 1917. — January 12, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Cont act, Construction. Evidence, Presumptions and burden of proof. Accord and Satisfaction.

One engaged in the business of collecting and selling statistical information relating to motor cars wrote to a manufacturer of motor cars in October, 1915, offering to furnish statistics to October 1 for \$900 and at the rate of \$700 a month for the remaining months of that year, and stating that, "if during next January you do give us an order for our service during 1916 at \$200 per month we will cancel the amount of \$900." In November, 1915, the manufacturer wrote accepting the offer. On January 31, 1916, the manufacturer wrote, "Will you please consider this letter our order for your monthly service as arranged for in our letter of November 4, for the calendar year of 1916, at a cost to us of \$700 per month. This will cancel the previous charges in this connection and authorize the continuance of the service, as previously arranged for." The furnisher of statistics acknowledged this in a letter dated February 10, in which a "credit memorandum . . . for the \$900" was enclosed. On August 1, 1916,

the manufacturer refused to carry out the contract and the furnisher of statistics brought an action against it for breach of contract, in which among other items he included the original charge of \$900. *Held*, that, while the plaintiff was entitled to recover on the other items, he had released the defendant from the original charge of \$900, and that the defendant's subsequent failure to carry out the terms of the agreement did not revive this obligation, the making of the contract for 1916 and not its performance having been accepted as extinguishing the charge of \$900 for the statistics up to October 1, 1915.

In the same case it was *said*, that, the burden being on the plaintiff to prove the contract and the letters by which the contract was made showing the extinction of the charge of \$900 by the agreement to pay \$200 a month in 1916, there was no ground for saying that the burden was on the defendant to prove a defence of accord and satisfaction.

CONTRACT, the declaration containing a first count for a breach of an express contract and a second count on an account annexed for \$2,700. Writ dated October 3, 1916.

The first item of the account annexed was dated November 24, 1915, and was "For furnishing registrations and totals to Oct. 1, 1915, \$900." The items from two to nine inclusive were "For furnishing motor lists registrations for" each of the months of October, November and December, 1915, and January, February, March, April, May and June, 1916, at \$200 a month. The eleventh item was for "Interest on \$2,700 . . . from September, 1, 1916, when demand for payment was made."

In the Superior Court the case was tried before *Bell*, J. The evidence is described in the opinion. Both parties asked the judge for rulings upon the question whether the plaintiff was entitled to recover the sum of \$900 for the total registrations up to October 1, 1915. The judge ruled that the question would be decided as a matter of law and reserved the right with the consent of the jury to modify the verdict under St. 1915, c. 185. There was evidence for the jury that the plaintiff performed and was at all times ready and willing to perform his part of the contract up to the time the plaintiff received the letter from the defendant dated August 1, 1916, although the defendant contended that the services rendered were unsatisfactory. The judge left the case to the jury upon the issues other than the one reserved by him as above. They returned a verdict for the plaintiff in the sum of \$2,460.

Later the judge ruled as a matter of law that the plaintiff was not entitled to recover the item for \$900 and ordered that the

verdict be entered for the plaintiff in the sum of \$1,537.50. At the request of the plaintiff he reported the case for determination by this court. If his ruling was right, the verdict was to stand; otherwise, the verdict was to be entered for the plaintiff in the sum of \$2,460 with interest from February 8, 1917, the date of the finding of the jury, with costs.

F. P. Garland, (*H. Tirrell* with him,) for the plaintiff.

W. J. Bannan, (*J. L. Harvey* with him), for the defendant.

CARROLL, J. The defendant is a manufacturer of motor cars. The plaintiff, who is engaged in collecting and selling statistical information relating to motor cars, on October 23, 1915, wrote to the defendant offering to furnish the statistics to October 1, for \$900, and at the rate of \$200 per month for the remaining months of that year; and "if during next January you do give us an order for our service during 1916 at \$200.00 per month we will cancel the amount of \$900.00." November 4, 1915, the defendant wrote accepting the offer of October 23 and stating: "This order is placed with the understanding that if we order the entire service for the 1916 season in the month of January, you will cancel the original charge of \$900, for the totals to October 1st." On January 31, 1916, the defendant wrote: "Will you please consider this letter our order for your Monthly service as arranged for in our letter of November 4, for the calendar year of 1916, at a cost to us of \$200. per month. This will cancel the previous charges in this connection and authorize the continuance of the service, as previously arranged for." This was acknowledged by the plaintiff in a letter dated February 10, in which a "credit memorandum . . . for the \$900." was enclosed. On August 1, 1916, the defendant refused to carry out the contract.

A verdict was returned for the plaintiff in the sum of \$2,460. The presiding judge later ruled, as matter of law, that the plaintiff was not entitled to recover the item of \$900, and directed that a verdict be entered for the plaintiff for the sum of \$1,537.50; and reported the case for the determination of this court.

The plaintiff's declaration was in two counts, the first for damages for breach of the agreement and the second upon an account annexed, of which one of the items was the charge of \$900 for furnishing registrations and totals to October 1, 1915. The answer was a general denial.

The contract of the parties was in writing. Its construction was for the court, *Smith v. Faulkner*, 12 Gray, 251, and there was no error of law in ruling that as matter of law the plaintiff was not entitled to recover the item of \$900. The defendant stipulated that, if it agreed to take the entire service for the year 1916 in the month of January, the charge of \$900 was to be cancelled. This was expressly stated in its letter of November 4, 1915. In January, 1916, the defendant gave the order for the service for that year, as shown in its letter of January 31, and in February this letter was acknowledged by the plaintiff and the credit memorandum for \$900 enclosed. By giving the order for the year 1916, the \$900 item was discharged, and the defendant's subsequent failure to carry out the agreement did not revive it. The contract itself, and not its performance, was accepted by the plaintiff in extinction of the claim for \$900. See *Cutter v. Cochrane*, 116 Mass. 408; *Rogers v. Rogers & Brother*, 139 Mass. 440.

No question of pleadings is open on the record, and, whatever remedy the plaintiff may have for the breach of the agreement, he cannot now recover the item of \$900 for the service to October 1, 1915. Their correspondence shows the contract of the parties, and that the disputed item was extinguished. The burden of proof was upon the plaintiff, and no question of accord and satisfaction arises.

Verdict to stand.

MARY KEOUGH vs. BOSTON ELEVATED RAILWAY COMPANY.

MICHAEL A. KEOUGH vs. SAME.

Suffolk. December 4, 1917. — January 12, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Self-serving statement, Declarations of deceased persons, Opinion. *Physicians and Surgeons*.

In the trial of an action by a woman against a corporation operating a street railway for personal injuries, where it had appeared that a physician, who had treated the plaintiff after her injuries before she went on a vacation with her husband and had treated her again after her return from the vacation, had

died in the following month, the plaintiff, after testifying that she had a talk with the deceased physician about "that trip," was asked, "Will you state what you told the doctor about your condition, and what he advised you to do, . . .?" and subject to the defendant's exception answered, "I told him I felt sorry this had happened, because Mr. K [the plaintiff's husband] was to go on his vacation and if I had to stay home, why it would spoil his vacation, because he could not have it later." There was a verdict for the plaintiff. *Held*, that this testimony clearly was inadmissible and that it might have harmed the defendant, so that the defendant's exception must be sustained.

In the same case the plaintiff was asked, "What did the doctor advise you to do?" and, subject to the defendant's exception, answered, "Advised me to go away a few days and see how it affected me, because he thought I was in such a horribly nervous state that if I got among strangers or got away from home, possibly my nerves would feel better." *Held*, that this testimony as to the statements of the deceased physician was not admissible under R. L. c. 175, § 66, because the statements purported to have been the advice of the physician to the plaintiff as his patient based on his opinion of her nervous condition, and could not have been found to have been made upon the personal knowledge of the declarant.

After making the answer above described, the plaintiff further testified that in consequence of her talk with the deceased physician she went to Washington, and it was *pointed out* that the fact that the plaintiff acted upon the advice did not make the advice admissible under the statute.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries, and the second by her husband for personal injuries and also for expenses incurred by him consequent upon the injuries to his wife, the injuries of both being alleged to have been sustained at about a quarter before eleven o'clock on the evening of April 30, 1915, while the plaintiffs were boarding an electric street railway car of the defendant bound for Ashmont and Milton at the stop at the Public Library in Copley Square in Boston. Writs dated respectively August 13, 1915, and December 4, 1916.

In the Superior Court the cases were tried together before *Hall, J.* The jury returned a verdict for the plaintiff Mary Keough in the sum of \$5,500 and returned a verdict for the plaintiff Michael A. Keough in the sum of \$2,000. The defendant alleged exceptions in regard to the admission by the judge of certain evidence as described in the opinion.

E. P. Saltonstall, (C. W. Blood with him,) for the defendant.

D. E. Hall, for the plaintiff.

CARROLL, J. These are actions of tort to recover for personal injuries alleged to have been received by the plaintiffs, on April 30, 1915, while boarding an outbound car at the Public Library,

Copley Square, Boston. Michael A. Keough also seeks to recover the expenses consequent to the injuries received by his wife, the plaintiff, Mary Keough.

Mrs. Keough was treated by Dr. Hastings twice each day until May 10, 1915. She then went on a vacation with her husband and on her return Dr. Hastings treated her three or four times a week. He died early in June, 1915. On May 5 of the same year, she testified in the Municipal Court of the City of Boston on a criminal complaint against the conductor of the car.

She was asked if she had a talk with Dr. Hastings about "that trip" (to Washington), and answered "Yes." This question was then put: "Will you state what you told the doctor about your condition, and what he advised you to do, the day after you had been to court?" Subject to the defendant's exception, she replied: "I told him I felt sorry this had happened, because Mr. Keough was to go on his vacation, and if I had to stay home, why it would spoil his vacation, because he could not have it later." This evidence was clearly inadmissible. Her statement that her husband's vacation would be interfered with, could not be received in evidence. The fact that these statements were made to her physician now deceased, does not make them admissible. They were her declarations made to him and not his declarations, and it is the declaration of the deceased person which the statute admits. R. L. c. 175, § 66. Such a narration could not be testified to by her, even if the doctor were alive, under the rule permitting an attending physician to testify to the condition, symptoms, feelings and sensations, as stated by the patient; nor could the physician testify to such a statement. *Roosa v. Boston Loan Co.* 132 Mass. 439. As this evidence may have been harmful to the defendant this exception must be sustained.

Mrs. Keough also was asked, "What did the doctor advise you to do?" The defendant excepting, she replied: "Advised me to go away a few days and see how it affected me, because he thought I was in such a horribly nervous state that if I got among strangers or got away from home, possibly my nerves would feel better." The declarations of a deceased person are admissible when made upon the personal knowledge of the declarant. The advice of Dr. Hastings to the patient, based upon his opinion of her nervous condition, to go away from

home for a few days, was not upon his personal knowledge. It was his opinion and his advice given to his patient. *Little v. Massachusetts Northeastern Street Railway*, 223 Mass. 501, and cases cited. She testified that in consequence of her talk with Dr. Hastings she went to Washington. The fact that she acted upon the advice did not make the advice admissible under the statute. R. L. c. 175, § 66.

The plaintiff introduced evidence in rebuttal to which the defendant excepted. As the question of the admissibility of this evidence may not arise at a subsequent trial, it need not be considered.

Exceptions sustained.

MEYER CAUMAN & another vs. AMERICAN CREDIT INDEMNITY
COMPANY OF NEW YORK.

Suffolk. November 20, 1917. — January 14, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Scope of authority. Insurance, Credit.

One who knows that he is dealing with a special agent is bound to ascertain the nature and extent of his authority.

A general agent of a credit insurance company has no power or authority by an oral agreement to dispense with or override an express agreement made with the insurance company by an applicant for a policy of credit insurance in his written application for the insurance.

Where an applicant for a policy of credit insurance makes his application by filling in and signing a printed form supplied by the insurance company, without reading the terms of the application or the conditions of the policy expressly referred to in the application, which is printed on the back of the form of the policy applied for, these conditions containing a stipulation for a minimum initial loss of \$500 to be borne by the insured and a stipulation that the insurance shall be void unless the person whose credit is insured is in sound financial condition on the day the premium is paid, and there is nothing to prevent the applicant from informing himself of the terms of the application and the conditions of the policy, and where also the application provides that the conditions and stipulations therein shall constitute the agreement between the undersigned and the insurance company, "any verbal or written statement, promise or agreement, by any agent of the said company to the contrary notwithstanding," the applicant is bound by the terms of the application he has signed, although at the time of signing he is assured orally by a special agent of the company that full protec-

tion will be given to the account in question without any deduction and without any proviso as to the financial condition of the person whose credit is assured when the premium is paid, and although the acts of this special agent are confirmed by the oral assurance of a general agent of the company.

CONTRACT against a credit insurance company for an alleged breach of a contract to insure or indemnify the plaintiffs against loss caused or to be caused by the failure of the Henry Siegel Company, a corporation, a debtor of the plaintiffs. Writ dated December 28, 1914.

In the Superior Court the case was referred to an auditor, who filed a report, of which the essential parts are stated or described in the opinion. He found that Goodwin and Mapes, mentioned in the opinion, "had no authority to make any contract which was binding upon the defendant" and that "there should be a judgment for the defendant." Later the case was tried before *Morton, J.* He ruled, "as a matter of law, that the evidence in the case was not sufficient to warrant the jury in finding either that the agent Mapes made such a contract and had authority to do so, or that, if he undertook to do so without authority, it was ratified." The judge ordered a verdict for the defendant and reported the case to this court for determination, with an agreement of counsel that, if his ruling was correct, judgment should be entered for the defendant; and that, if incorrect, judgment should be entered for the plaintiffs in the sum of \$3,280.57.

J. E. Hannigan, for the plaintiffs.

G. A. Ham, for the defendant.

CROSBY, J. This is an action to recover damages from a credit insurance company for breach of an alleged contract to insure or indemnify the plaintiffs against loss that might be incurred by the failure of Henry Siegel Company, a debtor of the plaintiffs. A judge of the Superior Court ruled that the evidence was not sufficient to warrant the jury in finding for the plaintiffs, and ordered a verdict for the defendant. He reported the case to this court upon the agreement of counsel that, if the ruling is correct, judgment shall be entered for the defendant; otherwise, judgment shall be entered for the plaintiffs for \$3,280.57.

The case was referred to an auditor, who found that on December 20, 1913, one Goodwin called on the plaintiff Wolper to solicit credit insurance. Goodwin presented his card, which described him as a

special agent of the defendant. Wolper stated that his firm had an account of about \$4,500 against the Henry Siegel Company which would be due on February 1, 1914, and which they would like to insure. Goodwin called Wolper's attention to a clause in the policies which provides that in case of loss the insured must bear a certain portion thereof known as the "initial loss." Wolper stated that the insurance must have no provision for an "initial loss," whereupon Goodwin said that if two policies were issued, one of general insurance for \$5,000 and a special insurance on the Siegel account for \$3,000, known as a "buffer bond," the protection on the Siegel account that was desired would be given, but that "back riders" would have to attach to the policies to cover the Siegel account, a "back rider" being a clause attached to a policy by which accounts are insured within a limited time before the date of the policy. Wolper stated that, as the Siegel account would be paid on February 1 and before the expiration of the policy, he would like to have the \$3,000 policy cancelled at that time and get a rebate on his premium; and Goodwin told him he would submit that proposal. Wolper signed an application for each of the two policies without reading either, gave Goodwin his check for \$400 in payment of the premiums, and took a receipt, a copy of which is printed in the record. The applications with the check were sent by Goodwin to the defendant's general agent, Mapes, who forwarded them to the home office of the defendant at St. Louis on December 22. With the applications he submitted the proposal of Wolper that the \$3,000 bond or policy be cancelled on February 1 after the Siegel account had been paid, and requested that Wolper be allowed a rebate on his premium. In reply the home office telegraphed that they would not issue the buffer bond with the cancellation privilege. Goodwin notified Wolper to that effect and showed him the telegram. Wolper then suggested that the buffer policy be cancelled after the Siegel account had been paid and that the defendant hold the premium rebate until the end of the year and apply it in payment for new general insurance. This new proposal was submitted to the home office by Mapes in a telegram dated December 27, and on the same date the defendant wrote a letter "in which it flatly refused to cancel the buffer policy and rebate the premium in any form," and stated in substance that the plaintiffs had better

accept a single bond of \$8,000. This letter was received on December 29 by Mapes, who gave it to Goodwin and told him to show it to Wolper, which was done. Wolper told Goodwin that he was willing to take the single bond of \$8,000 if that would protect his Siegel account, and Goodwin said it would have a special clause covering the Siegel account, that the policy would come immediately and that he might inform the bank that he was insured. On the same day Mapes told Wolper the account was insured and that he could so state to the bank. Again, on the morning of December 30, Mapes told Wolper that "the account was insured, the policy had no doubt been issued and that the bank might call him up to verify this." On the same day at half past one o'clock in the afternoon, Mapes received the following telegram from the home office of the defendant: "Not willing to issue Cauman bond; will return their check to-day." A petition in bankruptcy was filed against the Henry Siegel Company on the same day (December 30) at half past two o'clock in the afternoon.

The auditor further found that the two applications signed by Wolper "were in the defendant's usual form, printed on the back of the policies which were to be issued if the applications were accepted. They were identical in form and were each filled out in the same way by Goodwin under the direction of Wolper, who signed them." At the bottom of each application is printed the following clause: "This application and said Bond, if issued, shall, with the conditions and stipulations within written, constitute the agreement between the undersigned and the American Credit-Indemnity Company of New York, any verbal or written statement, promise or agreement, by any Agent of the said Company to the contrary notwithstanding. It is also agreed that this application, whether as respects anything contained therein or omitted therefrom, has been made, prepared and written by the applicant, or by his own proper agent."

The auditor also finds that "These applications, with the policies to which they were attached, were forwarded to the home office of the defendant on December 22. The body of the 'buffer' policy contained a provision for an 'initial loss' of \$500. to be borne by the insured. The general policy had a provision for a minimum 'initial loss' of \$500, which might in cases of a single

loss like the Siegel account, amount to \$1,200. To each of the policies when forwarded to the home office was attached a printed 'back rider,' in the defendant's usual form, which covered losses on goods shipped between October 21 and the date of the policy, provided the firms whose accounts were thus covered were in sound financial condition when the premium was paid. Wolper did not examine the bodies of these policies. He did not expect that he would have to bear an initial loss if Siegel failed. He desired no insurance unless it was a full insurance and both Goodwin and Mapes understood this. Wolper relied upon Goodwin's assurance that these policies recommended by Goodwin would give him the protection he desired. Wolper never examined the back riders although he knew that Goodwin expected to attach back riders to the policies in order to secure for him protection on the Siegel account which antedated the policy. Wolper was not informed that by the terms of these back riders his insurance against Siegel would be worthless unless Siegel was in sound financial condition on the day the premium was paid. . . . If a straight policy for \$8,000 had been issued to the plaintiff on the terms suggested in the letter of December 27 from the defendant's home office it would have been on the defendant's ordinary form which contains a provision for an initial loss and to which would have been attached a back rider in the same form as those already referred to, making the insurance worthless in case Siegel was not in sound financial condition on the date the premium was paid."

It is admitted that the Siegel Company was not "in sound financial condition" on December 20 when the premium was paid. Therefore under either policy issued upon the written applications signed by Wolper, there would have been no liability of the defendant by reason of the loss of the Siegel account.

The auditor further finds "that Goodwin, on December 29, made an oral contract with Wolper to procure for him insurance which would give full protection on the Siegel account without any deduction, and without any proviso as to the financial condition of Siegel when the premium was paid. It is also clear that Mapes confirmed the act of Goodwin." The question presented is whether Goodwin and Mapes or either of them had any legal authority to bind the defendant by their false and fraudulent representations made to Wolper.

It is well settled that, where the relation of principal and agent is found to exist, the principal is responsible for the acts of the agent within the apparent scope of his authority, and that an apparent general authority conferred upon an agent by his principal cannot be limited as to third persons when such limitation is not known by such persons. *Brooks v. Shaw*, 197 Mass. 376. *Sanford v. Orient Ins. Co.* 174 Mass. 416.

It is also settled that, where one contracts with an agent who apparently has a limited rather than a general authority, he is bound to make inquiry and ascertain the extent of the agent's authority to act. If one has notice that the authority of an agent is limited, he deals with the agent at his peril. *Kyte v. Commercial Union Assurance Co.* 144 Mass. 43. *Hill v. Commercial Union Assurance Co.* 164 Mass. 406.

Goodwin was a special agent of the defendant, and this was known to Wolper. There is nothing to show that Goodwin had any authority to issue policies on behalf of the defendant or to vary the terms of any policies which the defendant might issue. He represented himself to Wolper as a special agent and the latter was bound to ascertain the nature and extent of his authority. *Lovett, Hart & Phipps Co. v. Sullivan*, 189 Mass. 535.

Mapes was a general agent of the defendant, and, if it be assumed that he had authority to make contracts and issue insurance policies and vary the terms of such policies and bind the defendant, although contrary to the express terms of his contract of employment, still, as an agent with the most extensive authority, he could not by contemporaneous oral representations override the express agreement made by the plaintiffs and contained in the written applications signed by Wolper. *Allen v. Massachusetts Mutual Accident Association*, 167 Mass. 18.

Manifestly the limitations placed upon Mapes's authority to bind the defendant and contained in the written agreement under which he was employed would not affect the rights of third persons who, without knowledge of such limitations, dealt with him within the apparent scope of his authority. *Brooks v. Shaw, supra*.

The applications signed by Wolper recited that the bond "if issued, shall, with the conditions and stipulations within written, constitute the agreement . . . , any verbal or written statement, promise or agreement, by any Agent of the said Company to the

contrary notwithstanding." Among the conditions referred to was the statement that the buffer policy provided for an initial loss of \$500 to be borne by the insured, and the general policy had a provision for a minimum initial loss of \$500 which might, in case of a single loss like the Siegel account, amount to \$1,200. Both policies also contained a stipulation or condition that the firms whose accounts were covered by the insurance were "in sound financial condition when the premium was paid."

If Wolper did not see fit to read the applications or the conditions of the policies to which the applications expressly referred, the rights of the parties are not to be affected thereby, as there is nothing to show that he was prevented from informing himself of their contents if he so desired.

Whatever apparent authority Goodwin and Mapes had to bind the defendant, it is manifest that the plaintiffs are charged with knowledge that no representations or agreements made by Goodwin or Mapes would bind the defendant if contrary to the terms of the applications, and of the policies annexed and referred to in the applications.

The history of the transaction plainly shows that no agreement made by either agent for the issuance of policies in any form could become effective until assented to by the defendant at its home office; and this must have been known by Wolper, whose various proposals for modifications of the terms of the policies were in each instance rejected by the defendant and notice given to Wolper. Moreover the receipt which was given to Wolper upon payment of the premiums provided that the applications for insurance or indemnity were "subject to acceptance by The American Credit-Indemnity Co. of New York. In the event of the rejection of application, the above sum shall be refunded without liability on the part of said Company."

Upon the evidence as disclosed by the record, and which does not seem to be in dispute upon the facts, it is plainly apparent that no oral contract of insurance or indemnity was ever entered into or even contemplated by the parties. The evidence shows that the negotiations were all in anticipation of a written policy or policies to be issued by the defendant to the plaintiffs, which policy or policies were not issued because the parties never were able to agree upon the terms thereof. *Markey v. Mutual Benefit*

Life Ins. Co. 118 Mass. 178. *Myers v. Liverpool & London & Globe Ins. Co.* 121 Mass. 338, 342, 343. *Cunningham v. Connecticut Fire Ins. Co.* 200 Mass. 333, 337.

The language of Chief Justice Gray in speaking for this court in *Markey v. Mutual Benefit Life Ins. Co. supra*, is pertinent to the case at bar. It was there said at page 194: "The plaintiff's own testimony, already stated, shows that the only form of contract of insurance, contemplated by the parties, was by a policy issued by the defendant upon the written application of the assured, and there is no evidence whatever that the defendant intended, or was understood by the assured or the plaintiff to intend, to make a contract of insurance in any other form."

It further appears that, while the negotiations were pending and before the home office had accepted the plaintiffs' final offer, it learned that the Henry Siegel Company had failed and that a petition in bankruptcy had been filed against it. When the defendant learned of the financial condition of the Henry Siegel Company, it had a perfect right to refuse to issue any policy to the plaintiffs.

The finding of the auditor that neither Goodwin nor Mapes had authority to make any contract which was binding upon the defendant was well warranted. The judge correctly ruled that the plaintiffs could not recover and properly directed a verdict for the defendant.

In accordance with the terms of the report, judgment must be entered for the defendant.

So ordered.

JAMES M. CODMAN & others, trustees, *vs.* AMERICAN
PIANO COMPANY.

Suffolk. November 22, 1917. — January 14, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Covenant to pay taxes. *Tax*, On income. *Words*, "For,"
"In respect of."

A covenant in a lease of real estate, by which the lessee agrees to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments," binds

the lessee to pay all taxes except betterments imposed upon the real estate but not taxes imposed upon the income in the form of rent accruing therefrom, and, where the lessor has paid a federal income tax on the rent received by him from the leased premises, he cannot recover the amount so paid from the lessee.

CONTRACT by the trustees of the Municipal Real Estate Trust, a voluntary association, as the lessors under a lease in writing dated May 24, 1912, of certain real estate numbered 169 on Tremont Street in Boston against the lessee thereunder to recover \$266.67 with interest thereon, as being the amount of federal income taxes paid by the plaintiffs upon the rent received by them as income from the leased premises and alleged to be payable by the defendant as lessee under the terms of the covenant to pay taxes, which is quoted in the opinion. Writ dated July 31, 1917.

In the Superior Court the case was submitted to *Brown, J.*, as a case stated by agreement. At the request of the parties the judge, without making any decision, reported the case for determination by this court upon the pleadings and the case stated.

R. W. Hale, (*J. M. Maguire* with him,) for the plaintiffs.

A. C. Townsend, for the defendant.

CROSBY, J. Upon the case stated it appears that the defendant in 1912 entered into a written indenture of lease with Paul M. Hamlen and Miriam P. Loring as lessors whereby they demised certain premises to the defendant for a long term at a rental therein recited. The plaintiffs are trustees of a voluntary association which succeeded to the rights of the original lessors under the lease. The lease contains the following covenant: (b) "And the lessee further covenants and agrees with the lessors to pay punctually within fourteen (14) days from the times when they become due and payable all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments hereinafter arranged for."

Under the terms of the federal income tax enacted October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the association under § 2, paragraph G (a) was subject in each of the years 1914, 1915, and 1916 to a tax of one per cent upon its entire income arising or accruing from all sources during the pre-

ceding calendar year. In each of the years above referred to a tax at the rate of one per cent was duly assessed upon the association's entire net income, which assessments have been paid by the association in accordance with the terms of the act. The plaintiffs seek in this action to recover the amount of the taxes so paid upon the amount of the rent reserved in the lease and paid by the defendant to the association. The income tax act, under which the taxes were levied and paid, contains the following provisions:

"A. Subdivision 1. There shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income . . ."

"E . . .

"The provisions of this section relating to the deduction and payment of the tax at the source of income shall only apply to the normal tax hereinbefore imposed upon individuals."

"G. (a) The normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; . . ."

It is agreed that the plaintiffs are an "association" as that word is used in paragraph G (a), and that the defendant paid to the association the full rent in the amounts and at the times specified by the lease, and did not withhold the federal income tax of one per cent.

The question then is whether the defendant is liable to indemnify and pay to the plaintiffs the amount of the taxes upon the rents so paid by the plaintiffs to the federal government. It is the contention of the plaintiffs that the defendant is liable under the covenant in the lease above quoted, and that the case is governed by *Suter v. Jordan Marsh Co.* 225 Mass. 34, and by *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429; *S. C.* 158 U. S. 601.

This contention requires us to consider what these cases actually decided so far as they have any bearing upon the issue presented in the case at bar.

The case of *Suter v. Jordan Marsh Co.* decided that where the defendant was required to withhold and pay and did so withhold and pay to the United States, under the federal income tax law, paragraph E of § 2 above referred to, the "normal" income tax on certain rents reserved in a lease given by it to the plaintiffs, the defendant could not deduct the amount of such payment from the amount of the rent which it paid to the lessors. The lease in that case contained a covenant that the lessee should pay "all taxes and assessments whatsoever, except betterment taxes, which may be levied for or in respect of the said leased premises, or any part thereof, or upon or in respect of the rent payable hereunder by the Lessee howsoever and to whomsoever assessed." It is to be noted that the covenant required the lessee to pay the taxes not only for or in respect to the premises leased, but also "upon or in respect of the rent payable" under the lease. Accordingly it was said by this court that "by the terms of the lease, the defendant has obligated itself to pay 'all taxes and assessments . . . upon or in respect of the rent . . . howsoever and to whomsoever assessed.' The setting forth of the defence shows that it cannot prevail." In other words, the agreement of the parties as expressed in the lease is to govern and control their respective rights in view of the language employed.

In the case at bar the covenant in the lease contains no agreement that the lessee will pay taxes assessed upon or in respect of rent payable under the lease, and so is clearly distinguishable from the case of *Suter v. Jordan Marsh Co. supra*.

The case of *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429, dealt with the federal income tax law of 1894, and decided that a tax levied upon rents or income received from real estate was a direct tax and was unconstitutional because not levied in accordance with the constitutional rule of apportionment. In coming to the conclusion that a tax upon the rents or the income from real estate was a direct tax, the court said at page 581, "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income." Accord-

ingly it was held that a tax upon such rents was as much a direct tax as a tax upon the land itself.

When the case was heard in re-argument, 158 U. S. 601, the previous decision on this point was reaffirmed in the following language at page 637: "We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."

The decision in the Pollock case that a tax on rents of real estate is a direct tax, and that therefore the federal income law which provided for a tax upon such rents was unconstitutional, related only to the constitutional power of Congress to tax incomes. The court did not consider or decide that a tax on rent was a tax for or in respect to the premises from which the rent was derived. That is a wholly different question.

On rehearing of the Pollock case the court at page 618 expressly limited its judgment in the following words: "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct." Neither the Suter case nor the Pollock case decides the question presented in the present case, and therefore do not support the plaintiffs' contention.

When rent from land has become due, it is personal property; it is a chose in action and does not pass by a conveyance of the land. *Burden v. Thayer*, 3 Met. 76.

If a lessor dies during the term, the rents accrued during his lifetime are personal property and pass to his administrator, while rents that accrue after his death go to his heirs, or to whoever may be entitled to the real estate subject to the demise. *Clark v. Seagraves*, 186 Mass. 430, 439.

So rent from real estate which has accrued is held to be taxable at the domicile of the lessor, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, while the real estate from which rent is

derived is taxable at its *situs*. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194.

In this Commonwealth taxes upon real estate are assessed to the owner or person who is in possession on the first day of April. St. 1909, c. 490, Part I, § 15. St. 1914, c. 198, § 2. St. 1915, c. 237, § 23.

In determining whether the language of the covenant in the lease in question is sufficiently comprehensive to impose upon the lessee the obligation to indemnify the lessors who have paid the taxes under the tariff act of 1913 depends upon the construction of the phrase "for or in respect of the said leased premises." These words are to be interpreted in accordance with their natural and ordinary meaning. Manifestly taxes upon the real estate come within the terms of the covenant. It is equally clear that taxes for betterment assessments under such a covenant would have to be paid by the lessee unless otherwise stipulated in the lease.

On the other hand, we cannot construe the phrase in question as including within its terms a tax assessed by the federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than is the assessment upon the real estate. While under the federal income tax law a tax on rent is a tax on land and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for or in respect of the rent; his undertaking is to pay the taxes for or in respect of the premises. The covenant obligated the lessee to pay the taxes upon the real estate but not upon the income in the form of rent which arose therefrom.

In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another.

Under a covenant in a lease substantially like that under consideration, it was held that it did not include a tax upon the rent reserved. *Van Rensselaer v. Dennison*, 8 Barb. 23.

In *Woodruff v. Oswego Starch Factory*, 70 App. Div. (N. Y.) 481, affirmed in 177 N. Y. 23, it was held that it would not be a natural or reasonable construction of a similar covenant to interpret it as including a tax upon the rents reserved under the lease. In that case, the court uses this language: "Plaintiffs would be assessed in respect of the demised premises, and it would become the duty of the defendant to protect them and the premises against

such assessment by paying the tax thereon. But when we pass beyond this class of assessments and assume one made against the lessor upon his income or rents received under a lease, and otherwise in no manner based upon or measured by the lands leased, their value, character or condition, it seems to us that it would be a strained construction to say that such tax was on account of, relating to, or 'in respect' of, the demised premises, within the meaning of the covenant." *Codman v. Johnson*, 104 Mass. 491. *Twycross v. Fitchburg Railroad*, 10 Gray, 293.

The argument that the lessors, under the covenant in the lease, intended that the amount of rent reserved should be the net income to be received by them from the property demised cannot prevail unless such intention appears from the language which the parties saw fit to employ. It would seem to us, as was said in *Woodruff v. Oswego Starch Factory*, *supra*, to be "a strained construction to say that such tax was . . . within the meaning of the covenant." *Robinson v. Allegheny County*, 7 Barr, 161, 163. *Catawissa Railroad v. Philadelphia & Reading Railway*, 255 Penn. St. 269, 271. *Northern Trust Co. v. Buck & Raynor*, 263 Ill. 222.

We have examined all the cases cited in the elaborate brief filed by the counsel for the plaintiffs. The early English cases so cited must be held to stand upon the facts peculiar to each which distinguish them from the case at bar. For instance, those cases which relate to church rates, poor rates, tithes and subsidies are all decided upon the language of the covenants with which they respectively deal, and do not seem to us to be in conflict with the conclusion which we have reached, nor do we find anything in the reasoning of any of the cases cited and relied on by the plaintiffs to the contrary.

It may readily be conceded that a tax "on" or "for" or "in respect of" leased premises means the same thing, and that no sound distinction exists between them.

What is meant by taxes for or "in respect of" the leased premises? The legal signification clearly is that the taxes are those which relate directly to the premises themselves and not to the rent reserved which, when due, is a separate and independent estate. The fundamental fact on which the rights of the parties depend is that the defendant never agreed to pay the taxes on

the rent. In *Catawissa Railroad v. Philadelphia & Reading Railroad*, 255 Penn. St. 269, it was said, "The income tax was not imposed by the government upon 'the demised premises or any part thereof.' . . . It was imposed upon rental received by the lessor from the lessee." The words chosen by the parties cannot fairly be extended by us beyond their natural or ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant neither by express words nor reasonable implication obliged him to pay. *Smith v. Abington Savings Bank*, 165 Mass. 285. *Millard v. Monk*, 179 Mass. 22. *Van Rensselaer v. Dennison*, 8 Barb. 23. *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23. *Williams v. Delaware, Lackawanna & Western Railroad*, 240 Penn. St. 234. *Tennant v. Smith*, [1892] A. C. 150.

In accordance with the terms of the report, the entry must be
Judgment for the defendant.

MARY T. GRENNAN vs. SILAS PIERCE, trustee.

Suffolk. January 14, 1918. — January 14, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach, Validity. Trust, License to sell real estate. Equity Jurisdiction, Specific performance.

A trustee under a will, who by the terms of the will had authority to sell real estate, made an agreement in writing with a person desiring to buy certain real estate belonging to the trust to sell him this real estate "subject to the approval of the Probate Court for Suffolk County and if license to sell cannot be obtained, the deposit shall be returned and the agreement cancelled." At the hearing of the trustee's petition for a license the trustee appeared and represented to the Probate Court that since filing his petition he had received a more advantageous offer for the real estate than that set forth in the petition, whereupon the judge suggested an amendment of the petition substituting an averment of the higher offer and a prayer for a license to accept it, such an amendment was made and such a prayer was granted. Upon a suit in equity brought by the maker of the first offer against the trustee to enforce the specific performance of the agreement with him, it was held that the bill must be dismissed, because the condition of the agreement upon which alone the obligation to convey was to become operative never had occurred.

In the same suit it was *said* that the defendant trustee had committed no breach of contract and that in informing the Probate Court of the higher offer he had performed his plain duty as trustee.

In the case above described it also was *pointed out* that the fact that the trustee had authority under the will to make the sale without a license did not affect the validity of the requirement in the contract of the procuring of a license from the Probate Court as a condition precedent to a sale.

BILL IN EQUITY, filed in the Superior Court on July 30, 1917, against the surviving trustee under the will of Silas Pierce, late of Boston, to enforce the specific performance of an alleged contract to sell and convey to the plaintiff two lots of land with the buildings thereon numbered 47 and 49 on Hammond Street in Boston.

The material allegations of the bill are described in the opinion. The defendant demurred to the bill. The case was heard upon the demurrer by Fox, J., who made an order sustaining the demurrer. Later by order of the judge a final decree was entered ordering that the bill be dismissed. The plaintiff appealed.

E. Greenhood, for the plaintiff.

F. O. White, for the defendant.

BY THE COURT. The bill alleges that the defendant as trustee, having authority under the will to sell real estate, made an agreement with the plaintiff to sell certain real estate "subject to the approval of the Probate Court for Suffolk County and if license to sell cannot be obtained, the deposit shall be returned and the agreement cancelled;" that a petition for such license was filed, a citation was issued and on the return day no one appeared to oppose the granting of such license, but that the defendant appeared and "represented to the court that, since filing said petition, he had received" a more advantageous offer than that set forth in the petition, whereupon the court suggested an amendment substituting the higher offer, and this was done; and that "the defendant, by his own said conduct, prevented himself from obtaining a license to sell said estate according to the terms of said agreement with the plaintiff." The prayer is for specific performance and for a decree directing the defendant to procure a license unless opposition is made thereto, to require him to make good to the trust personally the difference between the agreed price and the subsequent offer, and for other relief.

It is manifest that the condition of the agreement, upon which

alone the obligation to convey should become operative, has never been performed. The court never granted such a license. It was the plain duty of the defendant in the execution of his trust to report to the Probate Court the fact that he "had received" a higher offer for the real estate than the price named in the agreement. He was in no way responsible for the action of the court. The record is at the opposite pole from showing any actual or constructive bad faith on the part of the trustee. The circumstance that the defendant had authority under the will to make the sale without a license does not affect the validity of the condition in the agreement as to procuring a license.

Decree dismissing bill affirmed with costs.

SECOND SOCIETY OF UNIVERSALISTS IN THE TOWN OF BOSTON

vs. ROYAL INSURANCE COMPANY, LIMITED.

SAME *vs.* YORKSHIRE INSURANCE COMPANY, LIMITED.

SAME *vs.* CALEDONIAN INSURANCE COMPANY.

SAME *vs.* COMMERCIAL UNION ASSURANCE COMPANY, LIMITED.

SAME *vs.* LONDON ASSURANCE CORPORATION.

SAME *vs.* PALATINE INSURANCE COMPANY, LIMITED.

SAME *vs.* INSURANCE COMPANY OF NORTH AMERICA.

SAME *vs.* SAME.

SAME *vs.* ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

SAME *vs.* QUINCY MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

SAME *vs.* SAME.

SAME *vs.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

SAME *vs.* MASSACHUSETTS FIRE AND MARINE INSURANCE COMPANY.

Suffolk. November 21, 1917. — January 15, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Insurance, Fire: computation of partial loss.

In an action upon a policy of fire insurance in the Massachusetts standard form to recover for the partial loss of a building by fire, in applying the general rule stated in *Hewins v. London Assurance Corp.* 184 Mass. 177, 181, that, where a

building is partially destroyed by fire, the loss is the difference between the value of the building before the fire and the value of the part remaining after the fire, it is proper for the presiding judge to instruct the jury that in estimating the value of the part of the building remaining the cost of repairing it is a very material matter and that, if the repairs must conform to certain requirements of the building laws, the nature of those requirements must be considered in determining the cost of the necessary repairs.

In the same case, where the jury under the instructions described above, as amplified and explained by the judge, found that the value of the building before the fire was a certain amount and that its value after the fire was a certain other amount, it also was *held* that the jury in fixing the fair value of the part of the building remaining after the fire must have considered and have made allowance for the restrictions of the building laws as affecting such value.

FOURTEEN ACTIONS OF CONTRACT brought by the Second Society of Universalists in the Town of Boston, a corporation, against twelve different insurance companies on fourteen policies of fire insurance in the Massachusetts standard form, for the loss by fire on February 10, 1914, of the church building of the plaintiff at the corner of Clarendon Street and Columbus Avenue in Boston. Writs all dated October 15, 1914.

After the decision of this court reported in 221 Mass. 518, overruling the defendant's demurrer in the first of the above named actions, the plaintiff, by leave of court, amended its declarations by adding to each a second count for a partial loss, its first count in each action having alleged a total loss.

In the Superior Court the cases were tried together before *Hitchcock, J.* No questions were raised by the defendants at the trial as to the issuing of the policies or as to there having been a loss thereunder or as to the sufficiency of notices or statements of loss. The proceedings are described in the opinion. The special questions submitted by the judge to the jury and the answers of the jury there are stated except the first question and answer, which were as follows:

"1. Was the award of the referees made in good faith and after a reasonable opportunity to both the plaintiff and the defendant to be heard and to present such evidence as they might severally desire?" The jury answered, "No."

The plaintiff asked the judge to order verdicts for the plaintiff in the total sum of \$73,000 with interest from April 11, 1914, to the date of the verdict. The judge refused to order verdicts for this total amount, giving the reasons stated in the opinion. He

made the rulings and gave the instructions there described and ordered verdicts for the plaintiff in accordance with those rulings and instructions amounting to the total sum of \$58,000 and interest. The plaintiff alleged exceptions, including an exception to the exclusion of certain evidence, which is described in the opinion.

J. J. Higgins, (*A. A. Gleason* with him,) for the plaintiff.

H. E. Warner, for the defendants.

DE COURCY, J. These fourteen actions were brought to recover for fire loss on the Second Universalist Church in Boston, on policies in the Massachusetts standard form, aggregating \$80,000, two being for \$10,000 each and twelve being for \$5,000 each. A separate action was brought on each policy, but the cases were tried together; and, as the questions raised are the same in each case, they are covered by one bill of exceptions.

The fire occurred on February 10, 1914. A submission to arbitration was agreed upon, and an award was made by two of the referees in July, 1914, fixing the loss at \$57,604. This the plaintiff refused to accept, and brought these actions to set aside the awards and recover under the policies. At the trial no question was raised as to liability. Under the first special finding of the jury the award must be considered invalid.

No exception was taken to the instructions given by the presiding judge as to the rule of damages if the award should be set aside. Nor was any objection raised as to the submission to the jury of the questions which, with the answers thereto, were as follows:

"2. Was the loss or damage by fire to the building owned by the plaintiff and insured in the policies of the defendant companies total or only partial?" The jury answered, "Partial."

"3. What was a fair value of the building owned by the plaintiff and which was damaged or destroyed by fire immediately preceding the fire?" The jury answered, "\$101,000."

"4. What was a fair value of such part of the building, if any, which was left after the fire?" The jury answered, "\$43,000."

"5. What would be a fair and reasonable cost to repair and restore the building to the condition it was in immediately preceding the fire with material of the same kind and quality and in the same manner of construction?" The jury answered, "\$59,000."

"6. What would be a fair and reasonable cost to repair and

restore the building with such material and manner of construction as might be required by the so called building laws of the city of Boston?" The jury answered, "\$73,000 as of 1914."

Thereupon the judge directed that the difference between the value of the property immediately preceding the fire and the value of what was left, as found by the jury (\$58,000), be prorated among the policies, and that verdicts for the plaintiff be entered for \$7,250 and interest on each \$10,000 policy, and for \$3,625 and interest on each \$5,000 policy. The plaintiff excepted to this direction and also to the judge's refusal to direct verdicts for \$73,000.

In the case of *Hewins v. London Assurance Corp.* 184 Mass. 177, 181, the general rule as to the amount of loss recoverable under the Massachusetts standard policy was stated to be, "where a building is partially destroyed by fire, the loss is the difference between the value of the building before the fire and the value of the part remaining after the fire." It is not contended that there was any language in either of these policies to render this ordinary rule inapplicable. The finding of the jury, that the value of the church building immediately preceding the fire was \$101,000 is not questioned. But the plaintiff contends that the jury, in fixing the fair value of that part of the building which was left after the fire, did not consider the increased cost of repairs under the Boston building laws.

In his charge to the jury on this subject, the presiding judge embodied the following extract, among others, from the opinion in the *Hewins* case: "Where the building is only partially destroyed and the proper course is to repair, . . . it is manifest that in estimating the value of the part remaining the cost of the necessary repairs is a very material matter; and, if the repairs must conform to certain legal requirements, the nature of those requirements is also to be considered. In considering the cost of repairs it would not be profitable to think of repairs which the law forbids, but only of those which the law does not forbid. . . . The building laws were the same at the time of the fire as at the time the policies were issued. The only change in the situation was in the physical condition of the building, and that change was caused wholly by the fire. The building laws simply constituted one of the conditions of the situation. While it is true that by

reason of their existence the loss caused by the ravages of the fire was greater than it otherwise would have been, it is none the less true that the sole operating cause of the change in the building was the fire, and as above stated in the absence of any provision in the policy expressly excluding from the damages the part arising out of that condition, that part is not to be excluded, but is to be regarded as primarily the result of the fire, or as 'loss or damage by fire.'" He further charged: "Now, all the questions which have been raised here with reference to the building laws of Boston have their applicability only to the question of determining what value, if any, there was to such portions of this building as were left, in case it was a partial loss. If it was a total loss, we need not disturb ourselves about the building laws of Boston. If it was a partial loss, then what was the value of what was left, taking into consideration the provisions of the law in regard to such use as may be made of that portion in rebuilding or in restoring property? If, under the building laws or other provisions of law, the building could not be restored in the form and manner in which it was before the fire, if there is any legal prohibition of such restoration, then what is left would not have any value, except as property to be removed from the building. If what was left could be made use of as a part of restoration, if that was a proper thing to do, a restoration in accordance with the terms of the law, then the question is, what was that fairly worth at that place, and as something which the plaintiff could make use of?"

After citing some of the building laws providing for fireproof construction, the judge added: "If there is any discretion existing in the building commissioner with reference to this (about which there may perhaps be some doubt) as a matter of law there exists a possibility that under the law the building could not be reconstructed or repaired except as a fireproof building. There is that possibility, and in determining the question of the value of the property that is left after the fire, it must be determined with reference to the possibility of such a condition existing, and not necessarily with reference to the absolute fact that such a condition will exist. If that possibility exists, if there be discretion and the possibility exists, then that possibility is an element to be taken into consideration in determining the value of what is left

of this building." In view of these explicit instructions we must assume that the jury, in fixing the fair value of what remained after the fire at \$43,000, considered and made allowance for the restrictions of the building laws as affecting that value.

The value of the building before the fire, and the value of the part remaining after the fire, having been found by the jury, the only amount which could be recovered was one for the difference between those values; and there was no error in directing verdicts aggregating that amount.

The exception to the judge's refusal to direct verdicts for \$73,000 is based on the answer of the jury to the sixth question. But, as already stated, what the plaintiff was entitled to was the difference between the value before and after the fire. The cost of repairs under legal restrictions is not necessarily the same thing as the value of what was lost. In fixing the value of the building after the fire the jury had before them evidence on which they might have found that the additional requirements of the building laws were not applicable or would not be enforced in the reconstruction of this building; or that, even if there should be additional cost due to the building laws, the value of what remained after the fire was \$43,000. The refusal to give this request did not constitute error. The plaintiff's forcible argument, that in view of the answer to the sixth question the jury could not have allowed for the increased cost of repairs under the building laws in fixing the value of the building after the fire, could be effectively addressed only to the trial judge in support of a motion for a new trial.

The only exception relating to the admissibility of evidence is that to the exclusion of the opinion of a witness that the steeple was out of plumb and unsafe. This referred to a condition of many years' standing, due to the settling of the building which was on "made" land. There was no evidence that the condition of the tower was in any way due to the fire, or that it affected the amount of the loss recoverable; and the counsel for the plaintiff, during his examination of the building commissioner, expressly stated that he did not claim the leaning of the tower to be material in the case. No error is shown in the exclusion of this testimony.

Exceptions overruled.

SALLY SANBORN vs. THOMAS B. McKEAGNEY.

Suffolk. January 15, 1918. — January 15, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of one controlling real estate. Snow and Ice. Way, Public.

In an action for personal injuries sustained by falling on ice on the sidewalk in front of the house of the defendant that was formed from water flowing from a conductor which drained the roof of a house adjoining that of the defendant and was on or near the dividing line between the two houses, there was no evidence tending to show that the defendant controlled the conductor or that any water from his house drained into it, and it was *held* that there was no ground on which the defendant could be found to be liable for the plaintiff's injuries.

In the action above described there was no evidence of any ordinance requiring the defendant to keep the sidewalk adjoining his house free from snow and ice, but it was *said*, that, even if there had been such evidence, the defendant could not have been found to have been liable.

TORT for personal injuries sustained on December 16, 1916, alleged to have been caused by slipping upon an accumulation of ice on the sidewalk in front of and adjoining the house of the defendant numbered 40 on Albion Street in Boston. Writ in the Municipal Court of the City of Boston dated May 9, 1917.

The evidence at the trial in the Municipal Court is described in the opinion. The defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and made the following finding: "I find that the plaintiff sustained the injuries complained of through slipping upon ice upon the sidewalk in front of the defendant's house, which ice was formed by the accumulation of water there coming from a conductor which then and for a period of years previously drained the roof of the adjoining house and was located on or about the dividing line between the houses, and that the ice formed by its discharge was negligently allowed by the defendant to remain on his sidewalk. No part of the defendant's roof was drained by the conductor."

The judge found for the plaintiff in the sum of \$1,500 and at the request of the defendant reported the case to the Appellate

Division. The Appellate Division made an order vacating the finding and ordering that judgment be entered for the defendant. The plaintiff appealed.

P. Daly, for the plaintiff.

L. C. Doyle, for the defendant.

BY THE COURT. The material facts as stated in the report are that the plaintiff, a traveller upon a public way in Boston, received personal injury on the sidewalk in front of premises owned by the defendant by slipping upon ice formed from water flowing from a conductor, which then and for years before drained the roof of a house adjoining the house of the defendant and which was on or near the dividing line between the two houses. There was no evidence tending to show that the defendant controlled the conductor or that any water from his premises drained into it.

No liability of the defendant can be established by inference or otherwise on this record. There is nothing to indicate responsibility resting on him for the conductor or the water flowing from it. Decisions predicated liability upon such control or ownership like *Field v. Gowdy*, 199 Mass. 568, *Marston v. Phipps*, 209 Mass. 552, *Drake v. Taylor*, 203 Mass. 528, *Leahan v. Cochran*, 178 Mass. 566, and *Hynes v. Brewer*, 194 Mass. 435, are inapplicable. The mere circumstance that ice was on the sidewalk in front of his premises did not show negligence on his part.

There is no evidence of any ordinance requiring him to keep the sidewalk clear of snow and ice. But if there had been such evidence that would not have rendered him liable. *Kirby v. Boylston Market Association*, 14 Gray, 249, 252. *Dahlin v. Walsh*, 192 Mass. 163, 166. See also *Menut v. Boston & Maine Railroad*, 207 Mass. 12; *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 493, 494.

Judgment should be entered for the defendant. St. 1913, c. 716, § 3. *Loanes v. Gast*, 216 Mass. 197.

So ordered.

FRANK RIPLEY'S CASE.

Suffolk. November 9, 1917. — January 17, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act. Evidence, Presumptions and burden of proof. Words, "Furnish."

The requirement of the workmen's compensation act contained in St. 1914, c. 708, § 1, that for the first two weeks after an injury to an employee the insurer "shall furnish reasonable medical and hospital services," is not complied with by having posted notices in the employee's place of work to the effect that he could be treated for injuries at a certain hospital, without having made arrangements with that hospital for such services and without having done anything more after the employee's injury than to direct him to go to that hospital.

In the case where the point above stated was decided, there was evidence that notices had been posted at the place of work of the employee to the effect that he could be treated for his injuries at the hospital to which his foreman suggested after his injury that he should be taken and to which the employee declined to go, and it was *held*, that, although this evidence would have supported a finding by inference that arrangements for the treatment of employees at that hospital had been made, it did not require such an inference as matter of law, and that a finding by the Industrial Accident Board that there was no evidence that any arrangements had been made to furnish treatment was warranted, there having been no direct evidence to that effect.

APPEAL to the Superior Court from a decision of the Industrial Accident Board upon intervening petitions under St. 1911, c. 751, Part III, § 13, of Dr. Henry O. Lacey and Dr. Frederic J. Cotton, asking for the approval by the Industrial Accident Board of the payment of their fees for services as physicians rendered to Frank Ripley, an injured employee of the Independent Ice Company and a claimant for compensation under the workmen's compensation act, during the first two weeks after his injury.

The decision appealed from was as follows: "The evidence shows that the only treatment offered the injured employee in the city of Cambridge was that in the notice offering treatment at the Cambridge Relief Hospital. To 'furnish' treatment within the meaning of the act imports, in the opinion of the board, something more than a mere direction to an employee to go to an open hospital or clinic. The act requires that the insurer shall make

adequate arrangements for the care of those to whom the duty is owed in the event of injury. There is no evidence here that any arrangements were made to furnish treatment, that anything was done more than to direct the employee to go to an open hospital. The board find that reasonable medical treatment was not furnished by the insurer and that the insurer is liable to Dr. Cotton in the amount of \$25 for his services and to Dr. Lacey in the amount of \$37."

The case was heard by *Fox, J.* The material facts which appeared by the report are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board ordering the insurer to pay the amounts named above to Dr. Cotton and Dr. Lacey respectively. The insurer appealed.

G. Gleason, for the insurer.

J. A. Donovan, for the claimant physicians.

CROSBY, J. This is an appeal under the workmen's compensation act by the insurer from a decree of the Superior Court directing the insurer to pay to two physicians certain sums for medical services rendered to Ripley, the employee, during the first two weeks following his injury.

The circumstances under which the services were rendered may be stated briefly: The employee, who was employed in a stable of the employer, was injured by being kicked by a horse; the foreman of the employer, one Paul, arrived at the stable soon after the accident and suggested to the employee that he be taken to the Cambridge Relief Hospital. Ripley replied that he did not want to go to the hospital, that he would like to have his own doctor if he could have him. The foreman told Ripley that he did not know of any reason why he could not have his own doctor, and Dr. Lacey was called who took Ripley home and treated him for his injuries. His bill for services covers the first two weeks after the injury. Dr. Cotton was called in by Dr. Lacey and assisted in treating the employee.

The uncontradicted evidence shows that at the time of the injury and previously thereto, notices were posted in different places on the premises where Ripley was employed directing the employees where to go for treatment in case of injury; one of the places so designated by the notices was the Cambridge Relief Hospital on Prospect Street.

The provision of the statute which requires the association to furnish "reasonable medical and hospital services" is contained in St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1. The word "furnish" as used in the statute was defined by this court in *Panasuk's Case*, 217 Mass. 589, at page 593, as meaning "something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief." These words import that some arrangements must be made in advance in the ordinary case, or at least that some one be at hand with authority to make the arrangements for medical relief. If arrangements with a hospital for medical attendance to the employee had been made, the act would have been complied with in that respect. *Davidson's Case*, 228 Mass. 257. There was evidence that notices had been posted on the premises where the employee was at work to the effect that he could be treated for his injuries at the Cambridge Relief Hospital; this evidence would support a finding by inference that such arrangements had been made. Still there was no direct evidence to that effect, and the board did not make that finding and was not required as matter of law so to find. On the other hand, the board did find that "There is no evidence here that any arrangements were made to furnish treatment, that anything was done more than to direct the employee to go to an open hospital." That finding must be accepted. It cannot be said to be unwarranted. Nor can it be said, in view of the findings of fact made by the board, that there was any error of law.

Decree affirmed.

CHARLES A. CARR vs. INHABITANTS OF DIGHTON.

CONSUELO A. CARR vs. SAME.

HALL, CARR vs. SAME.

Bristol. October 22, 1917. — January 21, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

School and School Committee. Evidence, Declarations of deceased persons.

Under R. L. c. 42, § 27, providing that the school committee of a town or city "shall have the general charge and superintendence of all the public schools,"

the action of a school committee in excluding a child from the schools, if taken in good faith and in accordance with the provisions of the statutes, is not reviewable by the courts.

The mere failure of a school committee to grant a hearing to the father of children excluded by the committee from the public schools does not render the exclusion illegal as matter of law, if the school committee acted in good faith.

The provision of R. L. c. 44, § 8, that "A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him an opportunity to be heard," does not apply to the exclusion of a pupil from the public schools on the ground that he has head lice.

In actions against a town by three children for alleged unlawful exclusion from the public schools by the school committee of the defendant, it appeared that the children were sent home on the ground that they had head lice, and that the school committee failed to give an opportunity to be heard to the father of the children. The school physician testified that the children were suffering from head lice, but there was testimony that they were free from such vermin. The father in demanding a hearing specifically alleged that the physician on whom the committee relied for their action was "animated by anything but good faith and honest motives," charged the superintendent with failure to afford him promised protection and referred to the "revengefulness" of teachers. There were five children of the family in the schools and it appeared that all five were sent home, although only three of them were examined, and there was evidence that one of the school committee admitted that "there had been a misunderstanding" and that ordinarily a hearing was given when requested. Under proper instructions the jury found that the exclusion was unlawful and gave damages to the plaintiffs. *Held*, that it must be assumed that the jury found that the exclusion of the plaintiffs from school was not in good faith and that there was evidence for the jury warranting such a finding.

In the case above described it was *held* that a certificate made by a physician who had died before the trial, stating that he had examined the heads of the plaintiffs and had found no vermin, properly was admitted in evidence under R. L. c. 175, § 66, after having been found by the presiding judge to be the declaration of a deceased person made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

THREE ACTIONS OF TORT against the town of Dighton by three minors by their next friend for alleged unlawful exclusion from the public schools of that town. Writs dated November 18, 1914.

In the Superior Court the cases were tried together before *White, J.* The certificate of Dr. F. A. Shurtleff, deceased, described in the opinion, was admitted in evidence by the judge, subject to the defendant's exception. The other evidence also is described in the opinion. At the close of the evidence the defendant asked the judge to make in each of the cases the following rulings:

"1. There is no sufficient evidence in this case to warrant the

jury in finding that the plaintiff was unlawfully excluded from the public schools of the defendant town."

"3. On all the evidence in the case, the plaintiffs are not entitled to recover."

The judge refused to make these rulings and "submitted the cases to the jury upon instructions to which no exception was taken." The jury returned a verdict for each of the plaintiffs in the sum of \$100, and the defendant alleged exceptions.

H. F. Hathaway, (J. E. Warner with him,) for the defendant.

A. S. Phillips, for the plaintiffs.

DE COURCY, J. On December 2, 1908, the plaintiffs and two other children of Charles E. Carr were excluded from a public school in the defendant town, of which they were pupils. The father, by letter dated December 9, applied to the school committee for a statement in writing of the reasons for the exclusion, in accordance with R. L. c. 44, § 7. The superintendent, on behalf of the committee, wrote in reply: "Dr. Joseph B. Sayles, medical inspector of the public schools of this town, has formally reported that he sent your children home from the Broad Cove School on account of having head lice and that the children themselves were properly instructed as to the best method to employ to get rid of them. It will be necessary for their heads to be properly taken care of and the children returned to school right away."

After some correspondence between the counsel for the Carr children and the school committee, the plaintiffs returned to school January 5, 1909. On the next day they were examined by the doctor in the presence of the superintendent, and again sent home. On the same day the superintendent notified their father, Charles E. Carr, that the heads of the plaintiffs "have been examined to-day by the school physician and not found to be in a proper condition to attend school." On January 9, Charles E. Carr, by his attorney, had a written notice served on the chairman of the school committee, which in substance demanded a hearing before the school committee as to whether they would ratify or disapprove the action of the superintendent and principal in excluding the children, and which imputed lack of good faith to the doctor and unfairness to the superintendent and teacher. No hearing was held by the committee. The plaintiffs did not return

to the school. On November 18, 1914, they brought these actions under R. L. c. 44, § 7, claiming damages "for unlawful exclusion."

The statute makes cities and towns liable where a school committee unlawfully exclude a child from a school, but does not define what exclusion shall be considered unlawful. This section must be considered in connection with R. L. c. 42, § 27, which gives the school committee general charge and superintendence of all the public schools. In the exercise of these broad powers their decision, involving the exercise of judgment and discretion, is not reviewable by the courts when they act in good faith in determining the facts on which that decision is based. *Bishop v. Rowley*, 165 Mass. 460. *Barnard v. Shelburne*, 216 Mass. 19, and cases cited. And in this case, if the committee had given the plaintiffs a fair and impartial hearing, admittedly their decision would have been final. See *Watson v. Cambridge*, 157 Mass. 561; *Hammond v. Hyde Park*, 195 Mass. 29; *Wulff v. Wakefield*, 221 Mass. 427.

The mere failure of the committee to grant a hearing to the father of the plaintiffs does not render the exclusion illegal. It is expressly provided in R. L. c. 44, § 8, that "A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him an opportunity to be heard." *Bishop v. Rowley*, *supra*. *Morrison v. Lawrence*, 181 Mass. 127. *Jones v. Fitchburg*, 211 Mass. 66. But the present case does not come within that section, as the plaintiffs were not excluded for "misconduct" within the meaning of § 8. See *Barnard v. Shelburne*, 216 Mass. 19, 22. Cases may arise where the cause of the expulsion is one that will not admit of the delay incident to a hearing, such as a contagious disease affecting a pupil or the household of which he is a member. See R. L. c. 44, § 6.

On all the evidence in the present case, however, including the failure to give the plaintiffs an opportunity to be heard, we think it was a question of fact for the jury whether the committee acted in good faith. *Morrison v. Lawrence*, 186 Mass. 456. On the school physician's testimony, the plaintiffs were not excluded for eczema, which was said to amount to a contagious disease, but were suffering from head lice. There was testimony on the other hand that they were free from these pests. In addition

to this denial of the underlying fact, their father, in demanding a hearing, specifically alleged that the physician, on whom the committee relied for their action, was "animated by anything but good faith and honest motives;" charged the superintendent with failure to afford him the promised protection, and referred to the "revengefulness" of teachers. In addition, it appears that five Carr children were sent home from school, although only three were examined; one of the committee was alleged to have admitted that "there had been a misunderstanding" and that ordinarily a hearing was given when requested. The weight of the evidence submitted is not for us to determine. The only question before us is, whether there was any evidence for the consideration of the jury that the exclusion was unlawful; and it is enough to say that there was such evidence. The cases were submitted to the jury on instructions to which no exception was taken; and after verdicts for the plaintiffs we must assume that the jury found the exclusion from school was not made in good faith.

There was no error in the admission of the certificate of Dr. Shurtleff, (dated January 7, 1909,) that he had examined the heads of the plaintiffs and found no vermin. It was the declaration of a deceased person made before the commencement of the action and upon the personal knowledge of the declarant. R. L. c. 175, § 66. *O'Driscoll v. Lynn & Boston Railroad*, 180 Mass. 187.

Exceptions overruled.

RICHARD F. BARRY vs. NEW YORK HOLDING AND
CONSTRUCTION COMPANY & trustees.

Suffolk. November 16, 1917. — January 24, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Bankruptcy. Judgment, For purpose of proof in bankruptcy proceedings.

In an action of contract, where the plaintiff would be entitled to a judgment but for the discharge in bankruptcy of the defendant pleaded as a defence to the action, the plaintiff upon motion is entitled to an order to have judgment entered for him in the sum ascertained, such judgment not to be enforced against the bankrupt personally or to be operative beyond such value as the

bankruptcy act attributes to it as evidence of the amount due as a provable claim in bankruptcy, and that execution on said judgment be stayed perpetually.

CONTRACT, begun by trustee process, for alleged breach of an agreement to employ the plaintiff. Writ dated November 22, 1913.

The proceedings at a previous stage of this case are reported in 226 Mass. 14. After the rescript accompanying the opinion there reported, the defendant obtained its discharge in bankruptcy, filed a certified copy of it and pleaded it in bar of the action. The plaintiff then moved for a general judgment against the defendant by the following motion in writing:

"Now comes the plaintiff in the above entitled cause, after rescript from the Supreme Judicial Court, and says that on January 3, 1916, the defendant's suggestion of bankruptcy and motion to continue were filed, and that the case has since that time stood continued; that since said date the said cause has been passed upon by the Supreme Judicial Court and rescript sent down; that the plaintiff is now entitled to a judgment in his favor for the amount of the finding made by this court, to wit, for the sum of \$2,195.19 and interest and costs.

"Wherefore the plaintiff moves that the continuance of record in said cause be removed and that judgment in his favor upon the finding of the court, with interest and costs, may be entered."

In the Superior Court the motion was heard by *Jenney, J.* At the hearing it was admitted that the defendant had obtained its discharge in bankruptcy as pleaded, and that the plaintiff did not seek by his motion to have a special judgment entered under any of the provisions of R. L. c. 177, but desired a general judgment with perpetual stay of execution. The bankruptcy proceedings in New York were still pending, and the plaintiff's claim, which was the subject of this litigation, had not been proved. The defendant and the trustee in bankruptcy thereupon asked the judge to give the following rulings:

"1. Proof of bankruptcy having been filed with motion to continue and the defendant being duly discharged, and said discharge being duly pleaded and proved by attested copies thereof, the motion of the plaintiff cannot be granted as matter of law.

"2. The discharge in bankruptcy of the defendant having

been pleaded, the continuance of record in the case cannot now be removed for the purpose of entering up a judgment as prayed for.

"3. If the defendant obtained a discharge in bankruptcy, as has been properly set forth in this case, that discharge is a defence to this action, and general judgment cannot be entered up against the defendant as matter of law."

The judge refused to make any of these rulings "so far as material in view of the order this day entered," which order was as follows:

"This case came on to be heard on the plaintiff's motion entitled motion to strike off continuance and for entry of judgment, filed April 3, 1917, and after hearing and upon consideration thereof, it is ordered that judgment be entered for \$2,090 with interest from the date of the filing of the auditor's report and for costs, and that execution on said judgment be perpetually stayed."

The defendant and the trustee in bankruptcy alleged exceptions.

G. L. Mayberry, (*J. T. Connolly* with him,) for the defendant and the trustee in bankruptcy.

F. N. Nay, (*F. A. Crafts* with him,) for the plaintiff.

PIERCE, J. After rescript, in *Barry v. New York Holding & Construction Co.* 226 Mass. 14, the defendant therein obtained its discharge in bankruptcy and pleaded it as a defence to the action. The plaintiff then moved for a general judgment against the defendant, not seeking a special judgment under R. L. c. 177. The motion was allowed and it was ordered "that judgment be entered . . . and that execution on said judgment be perpetually stayed." The sole question presented by the exceptions of the defendant and its trustee in bankruptcy is, whether the court properly could order such a judgment to be entered, as a matter of law.

Before St. 1875, c. 68, St. 1880, c. 246, § 8, Pub. Sts. c. 171, §§ 23, 24, and R. L. c. 177, § 25, the court constantly refused to enter a special judgment for the purpose of charging sureties upon bonds given to dissolve attachments. *Train v. Marshall Paper Co.* 180 Mass. 513, 516. These cases were decided not on the ground that the court had not inherent and statutory authority to order qualified judgments and to vary the forms of executions "when necessary to adapt them to changes in the law, or for other sufficient reasons," Rev. Sts. c. 97, §§ 10, 11, R. L.

c. 177, § 22, *Cooke v. Gibbs*, 3 Mass. 193, *Davenport v. Tilton*, 10 Met. 320, 330, but upon the fact that the condition of the several bonds which the sureties executed was to pay the plaintiffs the amount, if any, which they should recover against the defendant by final judgment, the nonpayment of which placed the defendant in default; and upon the law that the discharge in bankruptcy or insolvency prevents the recovery of a judgment which shall establish the personal liability of the principal defendant, and brings to an end the contingency upon which the obligation of the bond is made to depend. *Loring v. Eager*, 3 Cush. 188. *Carpenter v. Turrell*, 100 Mass. 450. *Hamilton v. Bryant*, 114 Mass. 543. *Braley v. Boomer*, 116 Mass. 527, 529. The basic reason which required the courts to refuse a qualified judgment to charge sureties on bonds to dissolve attachments before the statute applies with like force to bonds not within the statute but with similar conditions.

It is nevertheless the contention of the plaintiff that he should be permitted to have a general judgment with a perpetual stay of execution to enable him to prove his claim in the bankruptcy court in New York city (in which the case is still pending), under § 57 n of the bankruptcy act; which act, after providing that claims must be proved within one year after adjudication and cannot be proved subsequently, reads as follows: "or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment." This section was interpreted in *Powell v. Leavitt*, 80 C. C. A. 43, 150 Fed. Rep. 89, as if it read: "If the final judgment therein is rendered within thirty days before the expiration of such time, or at any time thereafter." See cases collected 7 C. J. 313, notes. In the case at bar it is admitted that the claim was unliquidated and was not "liquidated by litigation" within one year subsequent to the adjudication. It is manifest that the plaintiff cannot prove his claim in the bankruptcy court until final judgment shall have been rendered in the Superior Court.

There is nothing in the bankruptcy act to prevent the rendering of a special judgment in the State court, *In re Mercedes Import Co.* 166 Fed. Rep. 427, 429, *Hill v. Harding*, 130 U. S. 699, 703, and no statute in this Commonwealth stands in the way of

such action by the court in the exercise of its discretion. After a discharge in bankruptcy or insolvency the courts of this Commonwealth in numerous instances have ordered the entry of a special judgment and issue of an execution thereon to realize upon property expressly exempted from the operation of the bankruptcy law. *Davenport v. Tilton*, 10 Met. 320, 330, 331. *Bates v. Tappan*, 99 Mass. 376. *Bosworth v. Pomeroy*, 112 Mass. 293. In *Barnard v. Cushing*, 4 Met. 230, 234, it was said "the cases of suits proceeding to a judgment, without the authority to issue execution thereon, being very limited in their character, and such as are specially authorized by statute." In *Bates v. Tappan*, 99 Mass. 376, 378, it was held that "a lien, which the statute itself permits," can be enforced "by any requisite proceedings therefor which do not involve a judgment *in personam*. A lien by attachment can be enforced in no other way than by the qualified judgment which was rendered."

It is plain that § 57 n of the bankruptcy act intended to permit proof of claims, after the discharge of debtors and after the expiration of a year subsequent to the adjudication, in every case where the debt was unliquidated at the time of adjudication but had become thereafter by a final judgment "liquidated by litigation." It is equally manifest, that the permission of the statute would be but a vain and empty form if by reason of the discharge before judgment a final judgment in liquidation could not be obtained. It would seem to follow as a necessity of the situation, that a final judgment establishing the amount of the debt or claim should be framed in such a limited form as not to involve a judgment *in personam*, but be adequate to enable the creditor to reap the benefit of a proof of claim under the bankruptcy act.

We think the order for judgment should be modified so as to read: It is ordered that judgment be entered for \$2,090 with interest from the date of the filing of the auditor's report and for costs, said judgment not to be enforced against the defendant or to be operative beyond such value as the bankruptcy act attributes to it as evidence of the amount due as a provable claim in bankruptcy; and that execution on said judgment be perpetually stayed. St. 1913, c. 716, § 2.

Exceptions overruled; judgment to be entered as ordered.

FRANK W. CROCKER & others, trustees, vs. CITY OF MALDEN.

Middlesex. December 6, 1917. — January 29, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On personal property held in trust. *Trust*, Taxation. *Words*, "Office furniture."

Where in a return made by trustees to the assessors of a city of the taxable personal property in their hands as such trustees they included an item of "office furniture" in an office used by the trustees, and there was nothing to indicate that the trustees carried on a business therein within the meaning of St. 1909, c. 490, Part I, § 23, cl. 1, it was *held* that the office furniture was subject to taxation with the securities held by the trustees as a part of an indivisible fund.

Where the trustees of a trust created by the will of a resident of this Commonwealth were three in number and only one of them was a resident of the Commonwealth, and the sole beneficiary of the trust was not a resident of the Commonwealth, and where all three of the trustees filed with the assessors of a city in this Commonwealth a joint return of the taxable personal property in their hands as such trustees, it was *held* that such action was within the lawful power of the trustees and that the two non-resident trustees thereupon became subject to assessment in that city jointly with their co-trustee, who was a resident of that city.

In the case in which the point above stated was decided, it was *said* that the court did not intend to decide that the property could not have been assessed lawfully to the resident trustee alone.

PETITION, filed in the Superior Court on November 6, 1916, by the trustees under the will of Edwin C. Swift, late of Beverly, under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of the city of Malden to abate a tax of \$22,183.24 on personal property assessed to the petitioners for the year 1916.

The case was heard by *Chase*, J., without a jury, upon the pleadings and an agreed statement of facts, the essential part of which is stated in the opinion. The judge found for the respondent, and at the request of the parties reported the case for determination by this court. If his finding was wrong as matter of law, judgment was to be entered for the petitioners in such sum as this court might find to be due; otherwise, judgment was to be entered for the respondent on the finding.

J. F. Sullivan & F. Hutchinson, for the petitioners.

H. L. Boutwell, for the respondent.

PIERCE, J. This is a petition for the abatement of a tax assessed under St. 1909, c. 490, Part I, § 23, cl. 5.

On April 1, 1916, one of the petitioners was a resident of the respondent city of Malden; the others were non-residents of this Commonwealth. They had an office in Boston within the Commonwealth, and by virtue of an appointment as trustees under the will of a resident of the Commonwealth, then and there had the possession and legal title to the personal property claimed to be subject to taxation in the city of Malden. The income arising under the trust is payable to a sole beneficiary, who is not a resident of this Commonwealth. On May 12, 1916, the trustees filed with the assessors of taxes of the city of Malden a true list of their personal estate as such trustees, not exempt from taxation, in the form and manner prescribed by law. On the assumption that the whole personal trust estate was subject to taxation in the city of Malden the assessors of that city assessed the whole personal estate to the petitioners, at a value which is conceded to be the fair and correct value of that estate.

The trust fund consisted of bonds, stock in foreign corporations, deposits in trust companies and banks located in Boston, and there was also furniture in the office of the trustees in Boston of the value of \$100. All these securities were physically within the Commonwealth and were subject to taxation in the town or city where the testator resided in his lifetime; and after his death and the establishment of the trust, at the residence of the beneficiary if within the Commonwealth, and if not, at the residence or residences of the trustee or trustees within the Commonwealth. *Callahan v. Woodbridge*, 171 Mass. 595. *Frothingham v. Shaw*, 175 Mass. 59. *Welch v. Boston*, 221 Mass. 155, 158. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51. St. 1909, c. 490, Part I, § 23.

The agreed facts contain no statement regarding the use of the office in Boston by the trustees, and no inference that the trustees carried on a business therein, within the meaning of St. 1909, c. 490, Part I, § 23, cl. 1, can be drawn from the presence in the office of undescribed "office furniture." It follows that the "office furniture" was subject to taxation with the securities as a part of an indivisible fund.

On September 28, 1916, the plaintiffs duly filed with the as-

assessors of the city of Malden an application for an abatement of two thirds of the tax, and gave as reasons "(1) All of the beneficiaries of the trust under the will of Edwin C. Swift resided out of the Commonwealth of Massachusetts on April 1st, 1916," and "(2) There are three trustees of said trust, only one of whom resided in the city of Malden on April 1st, 1916." The assessors refused to allow an abatement and the plaintiffs duly and seasonably appealed to the Superior Court.

The remaining, and more important question, is, was the assessment illegal and void because assessed to all the trustees jointly.

The provision of St. 1909, c. 490, § 23, cl. 5, which reads " . . . if he [the beneficiary] resides out of the Commonwealth it shall be assessed in the place where the . . . trustee resides; and if there are two or more . . . trustees residing in different places, the property shall be assessed to them in equal portions in such places, . . . " first appeared in Gen. Sts. c. 11, § 12, cl. 5, and was adopted upon the recommendation of the Commissioners on the Revision of the General Statutes. The part thereof which provides that the personal estate shall be assessed "in equal portions" where the trustees reside in different places (within the Commonwealth), is a recognition of a rule existing before the statute and of the general principle, which underlies our system of taxation, that all personal property shall be assessed to the owner in the city or town in which he is an inhabitant. *Hardy v. Yarmouth*, 6 Allen, 277. The statute did not abolish joint tenancy in trust funds or make them assessable to the owners severally, where the trustees were inhabitants of the same city or town. Before the statute and since, inhabitants of the same city or town, joint owners in trust of personal property, were and are assessable jointly for taxes upon trust property subject to taxation.

In the case at bar the trustees were appointed by the Probate Court of Essex County, and they accepted the trust. They became bound to the performance of their duties as trustees and for the proper distribution of the trust fund held by them. In the performance of that duty they elected to act with their co-trustee, an inhabitant of Malden, in filing a list of the trust property subject to taxation with the assessors of the city of Malden. Without intimating whether they would be liable upon other grounds, we are of opinion that such action was within their

lawful power and that they thereupon became subject in the city of Malden to assessment jointly with their co-trustee, an inhabitant of Malden, we do not intend to decide by anything in this opinion that the property could not have been assessed lawfully to the resident trustee.

It follows that, by the terms of the report, judgment shall be entered for the defendant.

So ordered.

W. RUSSELL MACAUSLAND vs. SAMUEL A. FULLER.

Suffolk. November 9, 1917. — February 14, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Scire Facias. Trustee Process.

It here was *pointed out* that, in R. L. c. 189, §§ 45-49, relating to a writ of scire facias against a person adjudged a trustee in an action begun by trustee process, there is no provision for a trial by jury on the scire facias.

The default of a trustee in an action begun by trustee process upon his failure to answer more fully certain interrogatories when ordered by the court to do so is not an adjudication of the amount due from the trustee, and upon a writ of scire facias to enforce against him the judgment of default all matters of defence as to the amount due from the trustee which have not been passed upon previously by the court are open to him.

Upon such a writ of scire facias, where the plaintiff did not appear to have pressed for answers to his interrogatories already filed and not answered nor to have filed any additional interrogatories, but relied mistakenly on the trustee's previous default as establishing the extent of his liability, and where the trustee in defence to the action of scire facias offered oral testimony giving full answers to the interrogatories which he had failed to answer fully in writing, and this evidence was admitted by the trial judge, subject to the plaintiff's exception, it was *held*, that, although by correct procedure these answers should have been in writing, yet no substantial right of the plaintiff was affected by the reception of the oral evidence and therefore under St. 1913, c. 716, § 1, there was no reversible error in the admission of the defendant's testimony as to the amount actually received by him from the original defendant, which tended to reduce the amount for which he could be charged as trustee.

On the same writ of scire facias it also was *held* that, as the credibility of the oral testimony of the defendant was wholly to be determined by the trial judge, there could be no error of law in his finding based upon it reducing the amount for which the trustee was charged.

WRIT OF SCIRE FACIAS dated May 20, 1915, brought by a physician against Samuel A. Fuller, the alleged trustee of goods,

effects or credit of Edric R. Taylor, against whom the plaintiff obtained a judgment in an action for compensation for professional services reported (in its relation to the trustee) in 220 Mass. 265. In that action the trustee was defaulted for his failure to comply with an order of the court as to further answers to certain interrogatories, and it was ordered that judgment be entered for the plaintiff. In the decision of this court, referred to above, which was made on February 26, 1915, it was decided that there was no error in the orders of the Superior Court and that the default of the trustee was to stand.

The scire facias came on for trial at a jury session before *Morton, J.* A jury was empanelled. The defendant then waived trial by jury, as also did the plaintiff, who had not claimed such a trial. No finding was made by *Morton, J.*, but later he ordered that the case be marked on the short trial list for the session without a jury. At that session the case was heard by *Hardy, J.*

The plaintiff introduced in evidence the pleadings and record in the original action and the pleadings and record in the scire facias. Among the facts disclosed by those pleadings and records were the following:

In 1912, or earlier, Edric R. Taylor brought an action against the Boston and Maine Railroad and recovered judgment. Execution issued for \$12,850 in his favor. Samuel A. Fuller, Esquire, who was Taylor's attorney in that action, collected the entire amount of the execution.

In September of 1912, W. Russell MacAusland, who had been one of Taylor's physicians after the accident on which the action against the railroad company was based, brought an action in the Municipal Court of the City of Boston against Taylor for his services, naming Mr. Fuller as trustee. The writ was served on Mr. Fuller on September 23, 1912, and was entered in the Municipal Court on the return day, October 19, 1912. On October 23, 1912, Mr. Fuller, as attorney for Taylor, removed the action to the Superior Court by claiming a trial by jury and paying the requisite fee. This was the original action upon which the scire facias was based.

On March 23, 1914, a trial was had in the Superior Court before *Hitchcock, J.* The presiding judge ordered a verdict for the plaintiff in the sum of \$436.50, the full amount claimed. There were

no exceptions and no appeal was taken, and execution eventually was issued in the plaintiff's favor. That execution was returned to court, showing attempts to levy upon both the defendant and the alleged trustee, but in no part satisfied.

The interrogatories six and nine, mentioned in the opinion with the answers of the defendant, were as follows:

"Interrogatory 6. If your answer to Interrogatory 5 is in the affirmative, set out in full a copy or copies of such accounting or all such accountings, and state the date or dates on which you rendered it or them."

Answer: "Excepting in so far as this is answered in the answer to Interrogatory 5, I decline to answer on the ground that it is immaterial and irrelevant, unless ordered to do so by the court."

"Interrogatory 9. What amount did you charge said Edric R. Taylor for your services in connection with the action mentioned in Interrogatory 1?"

Answer: "I decline to answer on the ground that it is immaterial and irrelevant unless ordered to do so by the court."

The judge at the original trial ordered the defendant to make further answer to these interrogatories, and for his failure to do this he was defaulted as stated above. On the trial of the scire facias the defendant offered no evidence except his own testimony. He offered to show to whom he paid various sums of money from the \$12,850 in his hands as attorney for Taylor with the dates and amounts of such payments and the amount he charged Taylor for his own services and expenses. He offered no other material testimony. The plaintiff objected to the introduction of this evidence, and the judge admitted it subject to the plaintiff's exceptions.

The judge found for the plaintiff in the sum of \$200.25, and the plaintiff alleged exceptions.

The case was submitted on briefs.

W. H. Powers, A. A. Folsom & W. Powers, for the plaintiff.

C. Toye, for the defendant.

RUGG, C. J. This is a scire facias to determine the amount which shall be paid by the trustee in an action begun by trustee process against one Taylor, the principal defendant. R. L. c. 189, §§ 45-49. The claim for trial by jury rightly was waived. There is no provision for such a trial in this proceeding.

The action by trustee process and the writ of scire facias to determine the amount to be paid by the trustee "are part of one continued and connected course of proceedings." *Universal Optical Corp. v. Globe Optical Co.* 228 Mass. 84, 85. At an earlier stage of this proceeding the plaintiff recovered judgment against the principal defendant. The present defendant having been summoned as trustee and having answered, "No funds," was interrogated as provided in R. L. c. 189, § 11, and for failure to answer certain interrogatories was defaulted and adjudged a trustee. *MacAusland v. Fuller*, 220 Mass. 265. The court might have gone forward at that time, and determined the amount actually due from the trustee to the principal defendant, which he ought to be ordered to pay to the plaintiff toward the satisfaction of the debt. *Cunningham v. Hogan*, 136 Mass. 407. But that was not done. The trustee was merely defaulted. The court did not undertake to determine the amount due to the principal defendant from the trustee, which he ought to pay to the plaintiff. That subject was not litigated then and was not adjudicated.

The simple default of the trustee did not render him liable absolutely. *Shawmut Commercial Paper Co. v. Cram*, 212 Mass. 108. The default was not an adjudication of the amount due from the trustee. Cases relied upon by the plaintiff, like *Wilcox v. Mills*, 4 Mass. 218, 220, and *Hall v. Young*, 3 Pick. 80, hold that a trustee upon whom service has been made and who has been defaulted cannot thereafter question the jurisdiction of the court over him. They are inapplicable to a proceeding to establish the amount due from the trustee. The cases of *Perkins v. Bangs*, 206 Mass. 408, and *Sigourney v. Stockwell*, 4 Met. 518, did not arise on trustee process and therefore have no bearing upon the case at bar. The trustee is not the principal defendant and is not compelled by the statute to appear and to try his whole liability on the original summons, but may present his defence on its merits on the scire facias. That statutory practice has its foundation in the principle that ordinarily the trustee is a stakeholder, having no interest in the litigation between the plaintiff and the principal defendant, and that he ought to be placed in no worse position than he would have been in if he had not been drawn into that proceeding. *Cavanaugh v. Merrimac Hat Co.* 213 Mass. 384. See *Laughran v. Kelly*, 8 Cush. 199. At the hearing upon

the scire facias all matters of defence as to the amount due are open to the trustee, which have not been passed upon previously by the court. Therefore, the amount for which the trustee actually is liable must be ascertained at the present stage of the proceedings. The reasons for this are amplified by Chief Justice Bigelow in *Brown v. Tweed*, 2 Allen, 566. See, also, *Jarvis v. Mitchell*, 99 Mass. 530, and *Barnes v. Shelburne Falls Savings Bank*, 186 Mass. 574, 577.

The liability of one sought to be charged as trustee in scire facias ordinarily is to be determined upon an examination by interrogatories and answers, which are to be filed and answered in the same manner and with the same force and effect as in the original action. The interrogatories and answers arising in the initial stage of the proceedings are pertinent for consideration in determining the amount to be paid by the trustee. The answers are to be considered true, and if wilfully false the trustee is liable in an action of tort to pay to the plaintiff the amount of his judgment. R. L. c. 189, §§ 48, 18. *Fay v. Sears*, 111 Mass. 154. *Tryon v. Merrill*, 116 Mass. 299. *First National Bank of Clinton v. Bright*, 126 Mass. 535. *Varian v. New England Mutual Accident Association*, 156 Mass. 1, 3. *Wilde v. Mahaney*, 183 Mass. 455, 460. *Hubbard v. Lamburn*, 194 Mass. 398. See *Thompson v. King*, 173 Mass. 439. In the case at bar the answers by the trustee to interrogatories filed at the initial stage on their face showed that he was chargeable for the amount for which he was found liable by the judge. The plaintiff does not appear to have pressed for answers to the interrogatories already filed but not answered, nor to have filed any additional interrogatories. He relied on the previous default as establishing the extent of liability of the trustee. But, as has been shown, that contention is unsound.

The oral testimony offered by the trustee constituted in substance answers to interrogatories six and nine originally filed, which he declined to answer at the stage of the proceedings reported in 220 Mass. 265. Correct procedure required that these answers be in writing. But no substantial right of the plaintiff has been affected by the reception of oral evidence in place of written answers. St. 1913, c. 716, § 1. Therefore, there was no reversible error in the admission of the testimony of the defendant as to the amount actually due from him to the principal defendant.

As the credibility of this testimony was wholly for the trial judge, there is no error of law in the finding based upon it.

Exceptions overruled.

WILLIAM FOLLINS, administrator, *vs.* GEORGE A. DILL, trustee.

Suffolk. November 9, 1917. — February 25, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Amendment of docket entries, Exceptions. *Negligence*, Of one controlling real estate. *Elevator. Landlord and Tenant. Agency*, Scope of authority. *Custom. Contract*, In writing. *Evidence*, Extrinsic affecting writings.

A trial judge has power to order the correction of the docket record by the entering *nunc pro tunc* of an order previously made by the court, which through inadvertence had not been entered on the docket by the clerk.

The third floor of a building was leased to one whose business caused the accumulation of much waste paper, which this lessee gave to any one who would come there and take it away. There was a freight elevator in the building and there also was a passenger elevator which was operated to this floor. The lease of this lessee contained a provision that, "The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same." A man who was sent there with a large bag to get waste paper found that there was not waste paper enough to fill his bag and, leaving the bag to be filled on another day, started without it to go down from the third floor by the freight elevator. The elevator was not at that floor, the gate was up and he fell down the well, sustaining injuries that caused his death. In an action by the administrator of his estate against the owner of the building, who was the lessor in the lease mentioned above, for the conscious suffering and death of the plaintiff's intestate, it was *held* that the plaintiff's intestate, who could have no greater rights than the lessee under whose implied invitation he came upon the premises, had no right to use the freight elevator for his own transportation, so that the intestate was at most a licensee and the plaintiff could not recover.

In the case described above the plaintiff contended that the defendant had waived the requirement of the covenant by permitting lessees and their invitees to use the freight elevator for the transportation of passengers unaccompanied by freight. There was evidence that the lessee and other lessees in the building having similar leases violated the covenant, and it could have been found that the janitor of the building knew what was going on and did not remonstrate, but there was no evidence that the janitor had any authority to modify the provisions of the lease and no evidence that the defendant had any knowledge of the violation of the covenant. *Held*, that the implied acquiescence of the janitor did not bind the defendant.

In the same case the plaintiff contended that the requirement of the lease had been abrogated by a custom or usage of the tenants, of which the defendant

should have known, but it did not appear that such a custom or usage existed when the lease was made, and it was *held*, that, even if such a custom had been shown to have been in existence when the lease was made, oral evidence in regard to it could have no effect to contradict the clear and unambiguous covenant of the lease in writing.

TORT by the administrator of the estate of Richard I. Follins, late of Boston, for causing the conscious suffering and death of the plaintiff's intestate by injuries received by him on November 2, 1911, from falling down the well of a freight elevator in a building owned by the defendant, as trustee, on Eliot Street in Boston and leased to different tenants for stores and mercantile purposes. Writ dated December 28, 1911.

In the Superior Court the case was tried before *White, J.* The essential part of the evidence is described in the opinion. In 1911 the third floor of the building was leased to Joseph Aronson. The only provision in his lease material to the questions raised by the bill of exceptions was as follows: "The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same." There was in the building a passenger elevator which operated to the floor in question. All other portions of the building were let to other tenants by leases of substantially the same effect as that to Aronson.

One Cook, a witness for the plaintiff, testified that he and the intestate were working for the American Paper Stock Company and that he was with the intestate at the time of the accident; that they took two empty bags and went by means of the freight elevator to the third floor occupied by Aronson to get waste paper. He described the accident as follows: "We went in and he [Follins, the intestate] opened the fire doors and walked in, and he was accustomed to the place and he went around to where the paper was kept. I followed him, and he looked at the bag and it was about a quarter full, and he shouted across the room to somebody and asked them is that all they had, and they said yes, and he said it ain't worth taking today, and somebody in there — I don't know who it was — told him he better let it go for a couple of days, so he said we will leave a couple of empty bags anyway in case you might need them; then we turned round and started out, Follins leading. Follins started for the elevator door and I followed him round. He had to go round the fire door where

the fire door opened, the paper was kept in back of it in one corner, and to get out again you had to come out and round the door and I was about four or five feet behind him, it was kind of dark there, and he walked along and me right after him, and the first thing I see the gate came down in front of me and I looked over and Follins was down the well. . . . When we left the elevator, the gate was up with the elevator there. It was a day we had snow fall and pretty dark."

At the close of the evidence the defendant filed a motion asking the judge to order a verdict for the defendant. The judge denied this motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$6,000, of which they assessed \$1,000 for conscious suffering and \$5,000 for causing death. The defendant alleged exceptions, which were allowed after *Lawton, J.*, in the absence of *White, J.*, had caused the docket entries to be corrected by an amendment showing that the time for filing exceptions had been extended previously by *White, J.* The motion for the extension of time had been handed to the clerk of court at the time it was allowed but through inadvertence had not been entered on the docket. The defendant excepted to the order of *Lawton, J.*, amending the record of the docket entries.

C. S. Knowles, for the defendant.

W. J. Patron, for the plaintiff.

BRALEY, J. The trial court had power to vacate the order dismissing the exceptions, and thereupon to amend its docket in conformity with previous orders extending the time for filing exceptions, but which through inadvertence had not been docketed. *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15. Having been filed seasonably and allowed, the defendant's exceptions under the amended record are properly before us.

The jury could find that by falling or walking into the unguarded well of an elevator, designed for the transportation of freight, the plaintiff's intestate, while in the exercise of due care, suffered the injuries which after a period of conscious suffering caused his death, and that the accident would not have occurred if the operating equipment had been in proper repair. *Follins v. Dill*, 221 Mass. 93.

The plaintiff however cannot recover unless the defendant had undertaken the duty of maintaining the elevator in a reasonably

safe condition for the intestate's use. He went to the building to get waste paper from the third floor leased to one Aronson, who for his own benefit and to be relieved from accumulating rubbish gave the paper, as the jury could find, to any one who would come there and take it away. By the terms of the lease, the lessee "agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same," and the intestate was not clothed with any greater rights than the lessee under whose implied invitation he came upon the premises. *Baum v. Ahlborn*, 210 Mass. 336, 338. It is certain from his own declarations as testified to by his sister, and the evidence of his companion, the only witness of the accident, that when injured he was not intending to use the elevator for freight, as sufficient waste paper to fill the bags he took with him but left in the room had not accumulated, and when he started for the elevator his purpose was to use it only as a means of transit to the street floor. But, its use under such circumstances having been prohibited by the covenant, the intestate at most was a licensee, and the defendant's request for a directed verdict should have been granted. *Billows v. Moors*, 162 Mass. 42.

The plaintiff in avoidance of this conclusion relies on evidence from which he maintains that, while this provision had not been expressly annulled, the jury could find that it had been waived by permitting lessees and their invitees to use the elevator for the transportation of passengers when unaccompanied by freight. The covenant being for his benefit, the lessor doubtless could waive it, and waiver may be proved by conduct as well as by the declarations of the party against whom the intentional relinquishment of a known right is asserted. *Chace's Patent Elevator Co. v. Boston Tow-Boat Co.* 155 Mass. 211. *Stone v. St. Louis Stamping Co.* 155 Mass. 267. *Brownville Maine Slate Co. v. Hill*, 175 Mass. 532.

It is a question of fact if there is any evidence which warrants the finding. *McNeil v. American Bridge Co.* 196 Mass. 56. *Wood v. Blanchard*, 212 Mass. 53. But a full examination of the record reveals no dealings between the defendant and the intestate or knowledge by the defendant, even if the jury disbelieved his evidence, that the lessee repeatedly violated this covenant or that other tenants occupying under similar leases regarded it as being more honored in the breach than the observance. While

the janitor could be found to have known of what was going on, and did not remonstrate, he is not shown to have been authorized to modify the lease, and his implied acquiescence did not bind the defendant. The further argument, that the lease had been abrogated by custom or usage of which the defendant should have known because of its long continuance, fails to point out how the undisputed terms of a contract can be transformed or eliminated by proof of a custom or usage which comes into existence after the contract has become binding and is being performed. If urged upon the ground, that the custom or usage had been established when the lease was made and that the parties must be presumed to have contracted accordingly, the covenant is reduced to a mere collocation of ineffective words. It purports on its face to be an unambiguous instrument. The alleged countervailing custom when read in, leaves the lease as if the covenant had not been inserted. It has long been settled that a lease cannot be over-ridden thus and the parties' rights thereunder destroyed by parol evidence. *Shute v. Bills*, 191 Mass. 433, 438. *DeFriest v. Bradley*, 192 Mass. 346, 353. *Barrie v. Quinby*, 206 Mass. 259, 264, 265.

The exceptions must be sustained, and, it being sufficiently plain after two full trials on the merits that the plaintiff cannot prevail, judgment for the defendant should be entered in accordance with St. 1909, c. 236.

So ordered.



MARTHA RICE'S CASE.

Suffolk. November 13, 1917. — February 25, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Average weekly wages. Words, "Average weekly wages."

Where a girl sixteen years of age works at weaving in a mill as a "spare time worker," working all her spare time after school, which is three hours a day on each of five days of the week and all day on each Saturday, earning on the average \$3 a week, if she is injured in the course of her employment and files a claim under the workmen's compensation act, she can be awarded compensation on

the basis of the "average weekly wages" earned by her during the time she actually was employed, that is, \$3 a week, and is not to be deprived of compensation merely because her average weekly wages cannot be computed in any of the ways provided for in St. 1911, c. 751, Part V, § 2.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board in which they awarded compensation to Martha Rice, whose fingers were injured in the course of her employment, when, being sixteen years of age, she was a "spare time worker" in the Valley Woolen Mill at Cherry Valley, a village near Worcester.

The case was heard by *J. F. Brown, J.* The facts in regard to the only point in controversy are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, in which it was ordered and adjudged "that the employee is at present totally incapacitated for work because of the injury; that the average weekly wages of the claimant are \$7.50; and that there is due her to June 8, 1917, a total compensation of eighty-four and fourteen hundredths dollars (\$84.14) and a weekly compensation of \$5.00 during the continuance of her total incapacity." The insurer appealed.

The case was submitted on a brief by the insurer.

E. C. Stone, for the insurer.

No counsel appeared for the employee.

CROSBY, J. This is an appeal from a decree of the Superior Court affirming a finding of the Industrial Accident Board. The only question involved in the appeal is whether there was any evidence to warrant the finding of the board that the average weekly wages of the employee were \$7.50.

The employee, a girl sixteen years old, is found by the Industrial Accident Board to have been "a spare time worker; that is to say she worked in her spare time, after school, three hours five days and all day Saturday of each week, and earned approximately \$3 a week." The board also finds that a person working as a weaver, full time, all day six days a week, would average \$7.50 each week. The employee testified that she went to work in the employer's mill in vacation time of the summer of 1916 and learned to weave. She returned to school in the autumn; but at the end of the session each day she went into the mill and worked as a

spare weaver, averaging about three hours a day. She also worked on Saturdays in the mill. Her weekly pay while working as a spare weaver was from \$1.50 to \$3.50.

She was injured on December 7, 1916. It is apparent that the board in determining the amount of the average weekly wages did not act under St. 1915, c. 236.

There was no evidence to warrant the finding that the average weekly wages of the employee were \$7.50. The undisputed evidence shows that she began work during the summer of 1916 and returned to school in the autumn, and that, each day at the end of the school session, she worked as a "spare weaver" or "spare time worker" for approximately three hours, and also worked on Saturdays. On these facts there is no basis for ascertaining "average weekly wages" as defined in St. 1911, c. 751, Part V, § 2.

It is plain that average weekly wages cannot be determined from earnings "during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two." Nor can the finding that "All time except these working hours was 'lost' time within the meaning of the statute," be sustained. The facts in this case are clearly distinguishable from *Bartoni's Case*, 225 Mass. 349. Nor can average weekly wages be ascertained under that clause of Part V, § 2, which provides that, "Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." There is no evidence to show what average weekly amount, during the twelve months previous to the injury, "was being earned by a person in the same grade employed at the same work by the same employer;" and there is no evidence of the average weekly wages earned by a person "in the same grade employed in the same class of employment and in the same district." *Gorski's Case*, 227 Mass. 456, 461. The Industrial Accident Board on review, found that a person working full time as a weaver would

earn an average weekly wage of \$7.50; it also found that the employee was able to earn an average weekly wage of \$7.50.

The finding of the board that the average weekly wages of the employee were \$7.50 cannot be sustained, as the amount of compensation to be awarded under Part V, § 2 is to be determined, not by what the employee is capable of earning, but by what was actually earned. Nor could the compensation to be awarded the employee be determined upon the average weekly wages of a weaver; there was no evidence to show that she was a weaver; it appears that she was a "spare weaver" or "spare time worker," and there is nothing to indicate what the average weekly wages of such a person, so employed, would amount to. For this reason the case is to be distinguished from *Gove's Case*, 223 Mass. 187, 195.

If there is such an employment as that of "spare weaver" similar in hours of service, kind of work and requirement of skill to that of the employee during her term of employment, then that may be used as a basis of determining the compensation to be awarded according to the express terms of the statute. Part V, § 2. If there is no such kind of employment recognized in textile manufacturing, it does not follow that the employee shall go without remuneration, but that the "average weekly wages" actually earned by her during the time she was actually employed shall be the basis of compensation. "Average weekly wages" in such a case is not confined to the definition set forth in Part V, § 2. That definition governs all cases within its terms, but the general scope of the act indicates that the employee is not remediless because he does not come within any clause of that definition, provided he is an employee and is otherwise entitled to recover.

"Average weekly wages" in the definition not being applicable, the words "average weekly wages" in the sections as to payment (§§ 9 and 10 of Part II), should be interpreted in their common and ordinary sense and should be computed by dividing the total amount earned by the number of weeks of employment. The testimony and the finding of the board based thereon show such wages to have been \$3. This is one of the cases where "a different meaning" of average weekly wages from that given in the definition "is plainly required by the context." Part V, § 2.

If within thirty days after rescript the employee moves for further hearing, and that motion is allowed the case shall be re-

committed to the Industrial Accident Board. Otherwise, a new decree shall be entered on a basis of \$3.00 as average weekly wages, — the amount shown by the present record as average weekly wages.

So ordered.

COMMONWEALTH vs. FRED L. CLOSSON.

Suffolk. November 15, 1917. — February 25, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

United States Mail. Way, Public. Law of the Road. Jurisdiction, Over mail carriers. Constitutional Law.

A mail carrier, driving a horse attached to a mail wagon and engaged in distributing the United States mail on a public highway or on a public parkway, is subject to the rules and regulations made respectively by the street commissioners and the park commissioners requiring a traveller to drive on the right hand side of a road and in turning to the left into another street to pass to the right of and beyond the centre of the intersecting street before turning.

Although under U. S. St. 1884, c. 9, "all public roads and highways while kept up and maintained as such are declared to be post routes," and whoever knowingly and wilfully obstructs or retards "the passage of the mail, or any carriage, horse, driver, or carrier" is subject upon conviction to fine or imprisonment or both under the statutes of the United States, yet the public ways laid out and maintained by the Commonwealth and its subdivisions can be altered or discontinued only by the authorities that laid them out and such authorities also have the power of supervision and control inherent in the Commonwealth and can make and enforce reasonable regulations for the use of such public ways.

The regulations relating to the operation by drivers of vehicles on the public ways, which are mentioned above, are reasonable and constitutional and their violation properly is punishable as a criminal offence.

TWO COMPLAINTS, filed in the Municipal Court of the Roxbury District of the City of Boston on January 25, 1917, the first charging that the defendant on January 24, 1917, on Commonwealth Avenue in Boston, a public way in charge of the park commissioners of that city, "did drive a certain vehicle other than upon the right of said way, against the peace of the Commonwealth, and the form of the statute of said Commonwealth, and the by-laws and ordinances of said city of Boston and the rules and regulations of the board of park commissioners of said city of Boston, in such case made and provided," and the second charging that the defendant on January 24, 1917, on Commonwealth Avenue, a

public street in the city of Boston, "did drive a certain vehicle and upon turning to the left into an intersecting street, to wit, Brookline Avenue, did not then and there pass to the right of and beyond the centre of the said intersecting street before turning to the left as aforesaid, against the peace of said Commonwealth, and the form of the statutes of said Commonwealth, and the by-laws and ordinances of said city of Boston and the rules and regulations of the board of street commissioners of said city of Boston, in such case made and provided."

On appeal to the Superior Court the complaints were tried together before *Aiken, C. J.*

To both of the complaints the defendant filed a plea to the jurisdiction as follows:

"And now comes the defendant in these actions and denies the jurisdiction of this court, and for the following reasons:

"That the acts charged against the defendant in both of these complaints were committed by the defendant as an agent of the United States government, in and about a matter wholly within federal control; that is, he was engaged in distributing and delivering the United States mail in the manner prescribed for him by the United States authorities and while he as a sworn employee of the United States post office department was carrying out the duties imposed upon him as a United States agent.

"The acts alleged in both of these complaints were performed wholly without criminal intent upon the defendant's part, and said acts were entirely necessary in the speedy and uninterrupted transportation and delivery of the United States mails.

"That the control and method of delivery of the United States mail is entirely within the authority of the United States and cannot be regulated and controlled by the police powers of the Legislature of this Commonwealth.

"Wherefore the defendant prays this honorable court that it dismiss both of these complaints because of lack of jurisdiction in this matter."

The Chief Justice made an order overruling the plea to the jurisdiction, and the defendant excepted.

At the trial the defendant testified that he was engaged in delivering the United States mail from one of the post office department wagons when he committed the acts charged, he

being alone in the wagon, that he was authorized and instructed by the post office officials to take the shortest course, to travel upon the left hand side of the street and next the curb if doing so resulted in saving time and enabled him to deliver the mail more speedily and without interruption, and that his acts complained of were necessary in following out the instructions of his superiors. He further testified that to comply with the traffic rule and the park rules alleged to have been violated in the complaints and therefore to travel with his vehicle to the right of the centre of Commonwealth avenue at the part alleged in the complaint, he would be obliged to cross and recross the street each time he left his vehicle and entered a house and that he was obliged to deliver mail at nearly every house along the left hand side of the avenue and that on the day in question he had delivered mail at about ten houses on that side when he was stopped by the complainant.

The defendant further testified that, if he had travelled on the right of the centre of Commonwealth Avenue at the part of the avenue alleged in one of the complaints, he would have consumed about at least thirty-five minutes more in the distance from the intersection of Charlesgate West and the point where he was stopped by the complainant than he would have consumed in travelling on the extreme left hand side as he was doing at the time alleged. He further testified that he could not keep his mail matter, left in the wagon, under his control so well at that distance on the right hand side and that it would be in danger of loss by being stolen. He further testified that to follow the rule which the first complaint alleged he violated would greatly delay the mail on his route as a whole and he could not cover more than half the territory and he could not deliver mail in a speedy and uninterrupted manner.

One Hanson testified that he was the superintendent of the Back Bay postal station, having in charge the postal system in the entire Back Bay district of Boston, that the defendant was a letter carrier under his charge and direction and in travelling in the way alleged in these complaints was acting under his instructions and by his direction in the delivery of the United States mail in a speedy and uninterrupted manner; that a compliance with traffic and park rules involved in these two complaints would seriously

interfere with and greatly delay the delivery of the mails. He further testified that these instructions given by him were only given to the carrier when delivering the mail.

The rules and regulations of the board of park commissioners and the board of street commissioners of the city of Boston applicable to the complaints were admitted in evidence and it was agreed that these boards respectively had jurisdiction over the places referred to in the evidence. The rules and regulations put in evidence were as follows:

"Rules and Regulations of Board of Park Commissioners.

"Park Rule No. 5.

"No person shall ride or drive — on other than the right-hand side of a road and in a direct course, except when passing another or turning, or — past any animal or vehicle except to the left thereof, or — across a road without giving the right of way to all other persons, or — upon or over the space reserved for street railway cars and grass; or ride a cycle unless he has his hands on its handle-bar and his feet on its pedals and it has a suitable alarm-bell, or ride a cycle by the side of more than one cycle."

"Rules and Regulations of Board of Street Commissioners.

"Article 1, Section 6.

"A vehicle in turning to the left into another street shall pass to the right of and beyond the centre of the intersecting street before turning."

At the close of the evidence the defendant asked the Chief Justice to instruct the jury as follows:

"1. That upon all the evidence the jury must find the defendant not guilty on both of these complaints.

"2. That if the jury find that the defendant was engaged in delivering the United States mails at the time of the acts complained of, and that such delivery involved the acts here complained of, then the jury will find the defendant not guilty on both of these complaints.

"3. If the jury find that the defendant was engaged in delivering the United States mail, and that in order to facilitate said delivery he committed said acts, and that said acts were necessary in the speedy and uninterrupted delivery of the United States mail,

then the jury will find the defendant not guilty on both of these complaints.

"4. If the jury find that the defendant committed the acts complained of without criminal intent and acting wholly under the direction of his United States post office authority, then the jury will find the defendant not guilty on both of these complaints."

The Chief Justice refused to make any of these rulings, and submitted the cases to the jury, instructing them, among other things, as follows:

"If you find that the defendant committed the acts alleged in these complaints then you will find him guilty, regardless of the amount of delay which would have been caused the delivery of the United States mail had he complied with and obeyed the traffic rules which these complaints allege that he violated."

The jury found the defendant guilty on both of the complaints; and the defendant alleged exceptions.

F. T. Conley, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, submitted a brief.

BRALEY, J. The defendant does not contend that the rules and regulations of the respective commissioners of parks and of streets had not been duly promulgated, or were not in force at the time stated in the complaints, or that he did not violate those rules, which require the driver of vehicles to keep to the right hand side of the way, and that when passing on his left to an intersecting street he must before turning proceed to the right until beyond the centre of the intersecting street. It is immaterial that he was not actuated by any criminal intent. In prosecutions for misdemeanors created by statute under the exercise of the police power, proof of a guilty mind or corrupt purpose is not essential to a conviction. *Commonwealth v. New York Central & Hudson River Railroad*, 202 Mass. 394.

But by the plea to the jurisdiction, requests for rulings, and exceptions to a portion of the instructions, his defence rests upon the ground that, being employed as a mail carrier using a vehicle for the delivery of mail, he is immune from prosecution and punishment. The designated streets or ways are not however instrumentalities created by the general government, where "exemption from State control is essential to the independence and sovereign

authority of the United States within the sphere of their delegated powers." *Newcomb v. Rockport*, 183 Mass. 74, 76, 78. *Commonwealth v. Clary*, 8 Mass. 72. If they were, the defendant has committed no offence. While undoubtedly they are post roads under the United States statute of March 1, 1884, c. 9, enacting that "all public roads and highways while kept up and maintained as such are hereby declared to be post routes," and whoever knowingly and wilfully obstructs or retards "the passage of the mail, or any carriage, horse, driver, or carrier, . . ." is upon conviction, subject to fine, or imprisonment, or both, by U. S. Rev. Sts. § 3995, U. S. St. of 1909, c. 321, § 201, (Compiled Statutes 1916, § 10371,) yet the ways remain public ways laid out and maintained by the Commonwealth, which has the exclusive power, not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. The facilities thereby afforded for transportation of the mails confer no extraordinary rights upon mail carriers to use the ways as they please, nor do they necessarily or impliedly do away with the power of supervision and control inherent in the State. *Commonwealth v. Breakwater Co.* 214 Mass. 10. *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 350. *Dickey v. Turnpike Road Co.* 7 Dana, (Ky.) 113. *Seabright v. Stokes*, 3 How. 151. *Price v. Pennsylvania Railroad*, 113 U. S. 218, 221. *St. Louis v. Western Union Telegraph Co.* 148 U. S. 92. *Martin v. Pittsburg & Lake Erie Railroad*, 203 U. S. 284.

The use of the streets by travellers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated, and, being reasonable, because well adapted for the security and protection of all travellers, the rules are constitutional and their violation is punishable as a criminal offence. *Commonwealth v. Kingsbury*, 199 Mass. 542. *Commonwealth v. Maletsky*, 203 Mass. 241. *Commonwealth v. Feeney*, 221 Mass. 323.

The plea to the jurisdiction and the exceptions accordingly must be overruled.

So ordered.

ALEX WAHLBERG vs. CORNELIUS F. BOWEN & another.

Middlesex. November 23, 1917. — February 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability. Election. Workmen's Compensation Act, Defence of election of remedy under.

In an action by an employee of a firm of masons against the members of a firm of teamsters for personal injuries alleged to have been sustained by reason of the negligence of a driver of the defendants, whom the plaintiff was helping to back his team, the defendants contended that the plaintiff had elected to recover compensation from the insurer of his employers under the workmen's compensation act. It appeared that the plaintiff's employers were insured under the act and that persons injured in their employ were taken to a certain hospital, to which the plaintiff was taken after his injury, that the plaintiff was treated at the hospital for over nine weeks and paid all charges of the hospital except for the two weeks following his injury. It appeared that the services for the first two weeks were charged by the hospital to the plaintiff's employers and were not paid. The plaintiff was not asked to pay for the services for the first two weeks. The plaintiff testified that he knew what his rights were under the workmen's compensation act, but he did not know who sent for the ambulance that took him to the hospital and it did not appear in evidence who sent for it. It did not appear that the plaintiff knew that his employers were insured under the act. *Held*, that there was no evidence for the jury that the plaintiff had elected to accept the benefits of the workmen's compensation act.

TORT for personal injuries sustained by the plaintiff on February 5, 1914, when the plaintiff was in the employ of Dickson and Turnbull, a firm of masons engaged in setting stone at the Widener Memorial Library of Harvard College at Cambridge, by reason of the alleged negligence of a driver of the defendants, who were the members of a firm of master teamsters that delivered stone to be set up by the plaintiff's employers. Writ dated October 29, 1914.

The defendants' amended answer alleged "that, if it shall appear that the plaintiff ever received any injuries while in the exercise of due care owing to the defendants' negligence, the plaintiff was at the time of the alleged accident in the employ of a concern known as Dickson and Turnbull, who were insured under the workmen's compensation act, so called, in the Frank-

fort General Insurance Company, and that the plaintiff has proceeded against said insurance company for compensation under the said act; wherefore the plaintiff may not proceed against the defendants in this action."

In the Superior Court the case was tried before *Wait, J.* The bill of exceptions stated that "The issue of the defendants' negligence and the plaintiff's relation to the situation at the time of the accident was submitted to the jury under instructions not excepted to." The evidence on the issue, whether the plaintiff had lost his rights against the defendants by accepting compensation benefits under the workmen's compensation act from the insurer of his employers, is described in the opinion.

The judge, against the plaintiff's objection, submitted to the jury the issue in regard to the workmen's compensation act, concluding his charge on this subject as follows: "If you believe that the plaintiff accepted free to himself medical services for the first two weeks after the accident, recognizing that it was furnished him under the workmen's compensation act, he has thereby chosen or proceeded to choose the benefit of the workmen's compensation act, and cannot himself thereafter recover against the defendants."

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1917, and afterwards was submitted on briefs to all the justices except *Loring, J.*

H. R. Bygrave & G. E. Kimball, for the plaintiff.

E. C. Stone, for the defendants.

CROSBY, J. This is an action to recover for personal injuries received by the plaintiff while in the employ of Dickson and Turnbull, a firm that was engaged in setting stone at the Widener Memorial Library in Cambridge. The defendants were teamsters whose teams delivered the stone to be set, and the plaintiff was injured while assisting the defendants' driver, at his request, in backing the driver's team.

The plaintiff contended that his injuries were caused by the negligence of the driver; while it was the contention of the defendants that the driver was not negligent, that the accident was due to the negligence of the plaintiff, and that he was a volunteer.

The defendants also contended that the plaintiff had elected to recover compensation from the insurer of his employers under the workmen's compensation act (St. 1911, c. 751, Part III, § 15, as amended by St. 1913, c. 448, § 1), and therefore could not maintain this action against the defendants.

The presiding judge, subject to the exception of the plaintiff, submitted to the jury the question whether the plaintiff had elected to accept the benefits of the act. The plaintiff contended that there was no evidence of such an election.

In addition to certain money payments to which an injured employee is entitled under the workmen's compensation act, it was provided, at the time the plaintiff was injured, that "During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed." St. 1911, c. 751, Part II, § 5. It was held in *Panasuk's Case*, 217 Mass. 589, that medical and hospital services and medicines are a part of the compensation to which the employee is entitled.

Upon the question whether the plaintiff had elected to proceed under the act and had thereby lost his rights against the defendants, it appeared in evidence that the plaintiff's employers were insured under the workmen's compensation act with the Frankfort General Insurance Company; that immediately after the accident the plaintiff was taken in an ambulance to the Cambridge Relief Hospital. The plaintiff testified that persons injured in the employ of Dickson and Turnbull were taken to that hospital. He was treated at the hospital for over nine weeks and paid all charges of the hospital except for the two weeks following the injury. He further testified that he knew what his rights were under the workmen's compensation act; that he was visited about a week after he was hurt by representatives of the employers' and of the defendants' insurer, and saw an attorney of his employers' insurer some time after the accident; that "somebody told him and he knew that he would get compensation, that is he would get medical bills for two weeks and half his pay as long as he was laid up."

While it appears that the plaintiff's employers were insured under the act with the Frankfort General Insurance Company, it does not appear that the plaintiff knew that fact; he knew

that persons injured in the employ of Dickson and Turnbull were taken to the Cambridge Relief Hospital, but he did not know who sent for the ambulance in which he was taken there; and it did not appear in evidence.

Although he paid all the hospital charges except for the first two weeks, there is nothing to show that the treatment for these weeks was charged to the insurer or that the accident was ever reported to it. On the other hand, there was undisputed evidence that services for the first two weeks were charged by the hospital to Dickson and Turnbull and had not been paid.

The fact, that the plaintiff did not pay the hospital for services rendered him during the first two weeks, is not evidence that he elected to proceed under the act; he did not refuse to pay for these services, — he has never been asked to pay for them, — and it does not appear that the hospital authorities ever regarded him as responsible therefor, or that he knew that either the employer or the insurer was to pay such charges, or that they had been charged to his employer. On the other hand, it expressly appears that the services were not rendered on behalf of the insurer or charged to it. It may be conceded that he knew what his rights were under the act, — he so testified; still such knowledge would not be a bar to recovery in this action, unless the evidence shows that the service was furnished under the workmen's compensation act, and that he did something or so acted as to indicate that he had exercised his option to obtain compensation thereunder.

As there is no evidence to indicate an election by the plaintiff, it was error to submit that question to the jury for their determination. And, as the verdict for the defendants may have been rendered by reason of the finding of the jury upon this question without reference to the evidence upon the other issues in the case, the entry must be

Exceptions sustained.

ALLAN D. CRAIG *vs.* ADELAIDE PROCTOR.

HELEN C. HARTFORD *vs.* SAME.

Middlesex. December 3, 1917. — February 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Libel and Slander, Words not actionable in themselves, Special damage. *Malicious Interference*. *Damages*, In tort.

The words "Why wouldn't she have attractive gowns since two men are buying them for her" and "A C buys them for her as well as her husband," spoken orally concerning a married woman and A C, a married man, do not import adultery and are not actionable in themselves without the allegation and proof of special damage.

In the declaration in an action of tort for slander brought by A C for injury done him by the speaking of the words quoted above, allegations that the plaintiff, being engaged in business as a manufacturer, has had his "business relations with persons who had theretofore held him in good esteem . . . destroyed and disrupted; that his credit was damaged; that persons who had theretofore done business with him ceased to do so," because "they did not care to have business relations with a man of such depraved and vicious character," are good as averments of special damage and state a cause of action without stating the names of the persons who severed their relations with the plaintiff by reason of the speaking of the words.

In the case described above it was *said* that, if the defendant required greater certainty of averment for the purposes of defence to the action, he could file a motion for specifications and the trial judge could order the plaintiff to furnish the names of the persons referred to in his allegations of damage.

In an action of tort for slander brought by the married woman concerning whom the words quoted above were alleged to have been spoken, the declaration alleged that the defendant intended falsely and maliciously to "charge the plaintiff with being a woman of immoral character;" and it was *held* that the allegations did not impute the commission of any criminal offence and consequently did not state a cause of action without allegations of special damage.

In the same case it also was *held* that averments of loss of reputation, the alienation of friends who shunned her society, the suffering of mental anguish and of consequent physical illness were descriptive only of general and not of special damages.

TWO ACTIONS OF TORT for slander in speaking of and concerning each of the two plaintiffs the words which are quoted in the opinion, the plaintiff in the first case being a married man who was engaged in business as a manufacturer of shirts, and the plaintiff

in the second case being the wife of one Ezra C. H. Hartford. Writs dated January 12, 1916.

The defendant demurred to the declaration in each of the cases, in each case assigning three causes of demurrer. The first two causes of demurrer were the same in both cases and were as follows:

"1. That the alleged slanderous words do not charge or impute to the plaintiff any crime or any other slanderous statement, which is actionable *per se*.

"2. That the alleged slanderous words are not accompanied by such statements and averments of special damage as are necessary to constitute a cause of action upon words not slanderous *per se*."

The third cause of demurrer assigned in the first case was as follows:

"3. That the names of the persons whose society was lost, with whom his credit was damaged, and who ceased to do business with him are not set forth in said declaration."

The third cause of demurrer assigned in the second case was as follows:

"3. That the names of the persons who declined to have any association or neighborly relations with the plaintiff and whose society was lost are not set forth in said declaration."

The two demurrers were argued together before Fox, J., who in each case made an order sustaining the demurrer and ordering judgment for the defendant. From the judgments entered in pursuance of these orders each of the plaintiffs appealed.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiffs.

C. R. Darling, for the defendant. Captain *C. W. Bond & Yeoman F. A. Pierce*, U. S. N. R. F., who assisted in preparing the brief, were absent on active service at the time of the argument.

BRALEY, J. The jury could have found that the words, "Why wouldn't she have attractive gowns since two men are buying them for her," and "Allan Craig buys them for her as well as her husband," were uttered and published concerning the plaintiff Hartford, a married woman living with her husband, and of the plaintiff Craig, a married man. *Hanson v. Globe Newspaper Co.* 159 Mass. 293, 294. If published in writing or in print, the words which tended to expose the plaintiffs to aversion and disgrace, and to disseminate an evil opinion of them in the community.

would be libellous and actionable without evidence of special damages. *Miller v. Butler*, 6 Cush. 71. *Twombly v. Munroe*, 136 Mass. 464. *Loker v. Campbell*, 163 Mass. 242. *Gates v. New York Recorder Co.* 155 N. Y. 228. But in oral defamation, unless the falsely spoken words impute such conduct as shows the commission of a criminal offence for which, if true, he may be prosecuted, or charge that he is suffering from some contagious disease which, if known, would bar him from society, or that he is an unfit person to perform the duties of the employment or office exercised or held by him for profit, or that he is wanting in integrity in discharge of the duties of his employment or office, or unless the words cause him to be prejudiced in his profession or trade, the plaintiff must allege special damages resulting from the act complained of or the declaration is demurrable *Miller v. Parish*, 8 Pick. 384, 385. *Dunnell v. Fiske*, 11 Met. 552. *Allen v. Hillman*, 12 Pick. 101, 104. *Kenney v. McLaughlin*, 5 Gray, 3, 5. *Golderman v. Stearns*, 7 Gray, 181, 182. *Fitzgerald v. Robinson*, 112 Mass. 371. *Adams v. Stone*, 131 Mass. 433. *Billings v. Fairbanks*, 139 Mass. 66. *Morasse v. Brochu*, 151 Mass. 567. *Doyle v. Kirby*, 184 Mass. 409. *Pollard v. Lyon*, 91 U. S. 225. *Onslow v. Horne*, 2 Wm. Bl. 750; S. C. 3 Wils. 177.

By special damages is meant damages which are the natural but not the necessary result of the alleged wrong, and hence such damages do not follow by implication of law upon proof of the defamatory words. *Doyle v. Kirby*, 184 Mass. 409, 411. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 528.

The words declared on cannot be enlarged in meaning by the innuendo. While inferentially imputing censurable or indiscreet conduct because of the marital *status* of the parties referred to, they are insufficient to substantiate a charge of adultery. Lecherous thoughts or desires are not crime. *Goodrich v. Davis*, 11 Met. 473, 481. *York v. Johnson*, 116 Mass. 482. *Adams v. Stone*, 131 Mass. 433. *Sillars v. Collier*, 151 Mass. 50.

Inasmuch as the words are not actionable of themselves, the nature of the alleged wrong by which the plaintiffs have suffered the loss of some material or substantial advantage enjoyed or possessed must be specifically pleaded. The action as thus defined may not be technically an action for slander, but this is of no importance. *Cook v. Cook*, 100 Mass. 194. *Fitzgerald v.*

Robinson, 112 Mass. 371, 381. *Morassee v. Brochu*, 151 Mass. 567, 574. *May v. Wood*, 172 Mass. 11, 13. The allegations in the first case, that the plaintiff being engaged in business as a manufacturer has had his "business relations with persons who had theretofore held him in good esteem . . . destroyed and disrupted; that his credit was damaged; that persons who had theretofore done business with him ceased to do so" because "they did not care to have business relations with a man of such depraved and vicious character," are amply pleaded unless the names of the persons who severed their business relations with the plaintiff should have been stated. The court in *Morassee v. Brochu*, 151 Mass. 567, 572, speaking through Mr. Justice Charles Allen, said: "Where there is merely an accusation of immorality, in words which might be spoken of any one, whether having any particular occupation or not, it has often been held that a charge of special damages, from loss of custom or society, must include the names of those who have cut off from the plaintiff in consequence of the imputation. This rule has not been so strictly held in cases where the accusation has been made for the express purpose of injuring the plaintiff in his trade or profession, and has had that effect; and in various cases, and for differing reasons, the rule in such cases has been relaxed, and a general averment of loss of customers has been held sufficient. *Evans v. Harries*, 1 H. & N. 251. *Riding v. Smith*, 1 Ex. D. 91. *Clarke v. Morgan*, 38 L. T. (N. S.) 354. *Hopwood v. Thorn*, 8 C. B. 293, 308, 309, *per* V. Williams, J., *interloc.* *Weiss v. Whittemore*, 28 Mich. 366. *Trenton Ins. Co. v. Perrine*, 3 Zab. 402, 415. See also *Hargrave v. LeBreton*, 4 Burr. 2422. *Hartley v. Herring*, 8 T. R. 130." We are of opinion that the present case comes within the rule that the averments of loss of trade and of financial credit are sufficient under our system of procedure. The defendant, if she is apprehensive of being embarrassed in making her defence, can move for specifications, and the court can order the plaintiff to furnish names, dates and particulars. R. L. c. 173, § 68. *Nickerson v. Glines*, 220 Mass. 333.

But for reasons previously stated the allegations in the second case that the defendant intended falsely and maliciously to "charge the plaintiff with being a woman of immoral character" do not impute the commission of any criminal offence either at common

law or by statute. The averments therefore of loss of reputation, the alienation of friends who shunned her society, the suffering of mental anguish and of consequent physical illness are descriptive only of general and not of special damages. *Markham v. Russell*, 12 Allen, 573, 575. *Chesley v. Thompson*, 137 Mass. 136. *Finger v. Pollack*, 188 Mass. 208. *Garrison v. Sun Printing & Publishing Association*, 207 N. Y. 1. *Allsop v. Allsop*, 5 H. & N. 534.

The result is that in the first case the judgment is reversed and the demurrer overruled, but in the second case the judgment for the defendant is affirmed.

So ordered.

HARRY A. WRIGHT vs. MAYNARD CORSET COMPANY.

Hampden. January 7, 1918. — February 25, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Contract, Construction, Performance and breach. *Evidence*, Opinion: experts. *Practice*, Civil, Exceptions, Conduct of trial.

In an action to recover the amount which should have been payable to the plaintiff as royalties on the use of a trademark called "Cresco" in the sale of a certain kind of corset with a disconnected waist, it appeared that the plaintiff had sold to the defendant the right to use the trademark, agreeing that, so long as the defendant observed and fulfilled the terms and provisions of the agreement, the plaintiff would not engage directly or indirectly in the manufacture of corsets, and that the defendant "hereby agrees that it will pay [the plaintiff] royalties upon the sales made hereafter by [the defendant] of all corsets branded 'Cresco' having a disconnected waist, . . . and will continue to pay said royalties until [the plaintiff] has received from said royalties a total sum of" \$7,500, "and covenants and agrees that until such time as the full amount of royalties herein agreed upon shall be paid, that it will use its utmost endeavors to manufacture and sell such corsets." About a year and a half later the defendant reported sales upon which the total royalties due the plaintiff and unpaid amounted to \$66.62, and the plaintiff asserted that the defendant had violated its agreement to "use its utmost endeavors to manufacture and sell such corsets" by doing practically nothing to sell corsets under the trademark "Cresco" and claimed as damages the amount of the royalties which the plaintiff would have received if the contract had been performed according to its alleged true intent. The defendant contended that the only effect of its violation of the agreement was to release the plaintiff from his obligation not to engage in the manufacture and sale of corsets. *Held*, that the covenant of the defendant to use its utmost endeavors to manufacture and sell corsets under the plaintiff's trademark was an affirmative and independent

agreement for the plaintiff's benefit, for the breach of which he was entitled to recover such a sum of money as would have been due and payable to him had the covenant been kept and performed.

In the action above described, a witness for the plaintiff, who was an expert in regard to the sale of "Cresco" corsets, was asked, subject to the defendant's exception, "What is the way to sell these Cresco corsets? How should they be sold? How should they be got on the market?" and was permitted by the presiding judge to answer the questions. It appeared that the "Cresco" corset was a "specialty" corset which was sold on the market by methods not common in the sale of standard corsets. *Held*, that the jury could not be presumed to have knowledge of unusual and uncommon forms of trade bargains, and therefore that the subject was a proper one for expert testimony, the evidence being helpful, if not necessary, to assist the jury to determine whether the defendant had used its utmost endeavors to manufacture and sell the "Cresco" corset.

At the trial of an action for the alleged breach of a contract in writing, certain evidence was admitted by the presiding judge, subject to the defendant's exception, which might have been excluded as relating to oral conversations that afterwards were merged in and superseded by the contract in writing, and the presiding judge said, "I think [the defendant's counsel] was right there. I will let the evidence stay in subject to your exception; then I will talk with you later about what would be the correct construction of this contract. I think that is better than for us to pause to discuss the question now. We can do it more intelligently later on." The matter was not again called to the attention of the judge, who in his charge instructed the jury in accordance with the contention of the defendant. *Held*, that the defendant had no ground for exception.

The ordinary rule here was mentioned that the denial by a presiding judge of a motion for a new trial is not a matter of exception.

CONTRACT to recover as damages the amount of royalties which the defendant under its agreement described in the opinion ought to have earned for the plaintiff by the sale of the "Cresco" corset. Writ dated July 7, 1913.

The defendant's answer contained a claim in recoupment.

In the Superior Court the case was tried before *Aiken*, C. J. The material evidence is described in the opinion. The judge submitted to the jury two questions, which with the answers of the jury were as follows:

"1. If the contract was performed according to its true intent, what amount of royalties would be due Wright?" The jury answered, "\$1,776.93."

"2. What sum, if any, is due the Maynard Corset Company by way of recoupment?" The jury answered, "Nothing."

The jury returned a verdict for the plaintiff in the sum of \$700; and the defendant alleged exceptions, as explained in the opinion.

The case was submitted on briefs.

J. W. Sheehan, for the defendant.

A. L. Green & F. F. Bennett, for the plaintiff.

PIERCE, J. In January, 1912, the plaintiff and the defendant entered into negotiations for the sale to the defendant of the business, good will, and registered trademark "Cresco" then owned by the Cresco Corset Company, a corporation organized, incorporated, and controlled by the plaintiff. The "Cresco" corset is a corset with a disconnected waist, which any one may make if use is not made of the trademark "Cresco" in connection with its sale. The defendant is a corporation, and at the time of the negotiations and of the contract which followed was engaged in the manufacture and sale of "standard" as distinguished from "specialty" corsets, although it was familiar with "Cresco" corsets, having manufactured them for a considerable time for the plaintiff.

On January 31, 1912, the Cresco Corset Company conveyed to the defendant the business and good will of the corporation, including the registered trademark "Cresco," and on the same day an instrument under seal "for and in consideration of the mutual covenants and agreements," recited: "The first party [the plaintiff] hereby gives, grants and conveys to the second party [the defendant], all his rights, title and interest in and to the manufacturing and selling of corsets, and good will thereof, and further covenants and agrees that so long as the second party observes and fulfills the terms and provisions of this agreement he will not engage in, directly or indirectly, the manufacture or sale of corsets. The second party hereby agrees that it will pay the first party royalties upon the sales made hereafter by the second party of all corsets branded 'Cresco' having a disconnected waist, . . . and will continue to pay said royalties until the first party has received from said royalties a total sum of seven thousand five hundred (7500) dollars. . . . [That it] will keep accurate books of account, showing the number of such corsets sold by the second party, . . . and will render account of such sales to the first party in monthly statements. . . . The second party hereby acknowledges the rights of the first party to corsets having a disconnected waist, and covenants and agrees that until such time as the full amount of royalties herein agreed upon shall be paid,

that it will use its utmost endeavors to manufacture and sell such corsets."

Between the date of the contract and July 1, 1913, the defendant reported sales upon which the total royalties due the plaintiff and unpaid amounted to \$66.62. Within this period the plaintiff alleges the defendant violated its agreement to "use its utmost endeavors to manufacture and sell such corsets" by doing "practically nothing" to prosecute the business, and claims therefor damages measured by the royalties it should have received had the contract been performed according to its true intent.

On the other hand the defendant contends that the sole and only effect of its violation of the agreement is to relieve the plaintiff of his covenant and agreement "that so long as the second party observes and fulfills the terms and provisions of this agreement he will not engage in, directly or indirectly, the manufacture or sale of corsets." In support of this contention the defendant argues that the provision of the contract which reads, "The second party hereby acknowledges the rights of the first party to corsets having a disconnected waist," out of an abundance of caution, was inserted "to show that in the event of a breach of the conditions of this contract, the plaintiff had a right to make such corset;" and that the provision "that until such time as the full amount of royalties herein agreed upon shall be paid, that it will use its utmost endeavors to manufacture and sell such corsets," was intended as a limitation upon the right of the defendant to go ahead indefinitely manufacturing and selling corsets with a disconnected waist without stamping them with the trade name "Cresco," and thereby reap whatever benefit might result, without being in any way liable to the plaintiff; while the plaintiff during all the time would be prohibited from engaging directly or indirectly in the manufacture and sale of the corsets.

If we assume the foregoing provisions of the contract were inserted to define the obligation which the party of the second part was required by its covenant to observe and fulfil as a condition precedent to its right to enforce the covenant of the party of the first part not to engage in the manufacture and sale of corsets, we are none the less of the opinion that the covenant of the defendant, to use its utmost endeavors to manufacture and sell such corsets, is also an affirmative and independent agreement, which requires

and calls for the exercise of sound judgment and business energy and activity, in the prosecution of the business to which the agreement relates, to the end that the plaintiff may realize within a reasonable time the most profitable returns in the way of royalties for "Cresco" corsets sold, which is consistent with a prudent and sagacious conduct of the particular business of the defendant.

We do not agree with the contention of the defendant that the agreement to pay royalties and to "continue to pay said royalties" until from said royalties the party of the first part has received a total sum, restricts the measure of damages for breach of the covenant to "use its utmost endeavors," to a sum of money then due and payable to the plaintiff as royalties. We think the measure of damages is such a sum of money in royalties as would have been due and payable had the covenant been kept and performed.

We think the exception to the question to Wright "What is the way to sell these Cresco corsets? How should they be sold? How should they be got on the market?" and to his answer must be overruled. Wright was an expert in the sale of the "Cresco" corsets. The "Cresco" corset is a "specialty" corset which is sold on the market by methods not common in the sale of standard corsets. The jury could not be presumed to have knowledge of unusual and uncommon forms of trade bargaining. Such knowledge was helpful, if not necessary, to assist the jury in determining whether the defendant had used its utmost endeavors to manufacture and sell the "Cresco" corset.

The exceptions of the defendant to the questions and answers as to what was said before the execution of the agreement as to the right of the plaintiff to a corset having a disconnected waist, and also as to whether anything was said about what corsets should be branded "Cresco," must be overruled. In regard to the admission of these questions and answers the presiding judge said: "I think Mr. Sheehan was right there. I will let the evidence stay in subject to your exception; then I will talk with you later upon what would be the correct construction of this contract. I think that is better than for us to pause to discuss the question now. We can do it more intelligently later on." The matter was not again called to the attention of the judge, and the

judge in his charge instructed the jury in accordance with the contention of the defendant.

The refusal to grant a new trial is not a matter of exception.

We have considered the exceptions in their order as argued by the defendant, and find no error.

Exceptions overruled.

CARROLL E. MCINTIRE vs. EDMUND F. LELAND & another.
WILBUR C. MCINTIRE vs. SAME.

Middlesex. November 22, 1917. — February 26, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Dog, Keeper. Husband and Wife. Practice, Civil, Order of judgment under St. 1913, c. 716, § 1.

In an action under R. L. c. 102, § 146, by a boy against a husband and wife to recover double damages for having been bitten by a dog alleged to have been kept by the defendants jointly or by one of them individually, it appeared that the boy was bitten by a dog, that this dog was given by an acquaintance of the defendant husband to the eleven year old son of the defendants, that the defendant husband took the dog to a farm owned by the defendant wife and operated by the defendant husband through a foreman, which the defendants used as a summer home, that the defendant husband's foreman lived with his wife in a cottage on the farm and that the employment of the foreman included the services of his wife without any separate pay for her, that the foreman ran the farm, the bills being paid by the defendant husband, and that the foreman's wife fed the dog at the cottage, that the defendant wife had nothing to do with the management of the farm and had nothing to do with the dog, which she did not like and wished her son to get rid of, and that the defendants' son who owned the dog was only occasionally at the farm and was not there at the time the plaintiff was bitten by the dog. *Held*, that there was no evidence that the defendants jointly were the keepers of the dog and no evidence that the defendant wife was its keeper, but that a finding was warranted that the defendant husband was the keeper of the dog.

In the same case it was *said* that the mere fact of ownership by the wife of the farm on which the dog was kept by the husband was not sufficient to raise an inference of the joint keeping of the dog by the husband and wife and thereby to overcome the presumption of the exercise of dominant authority by the husband and of compliance by the wife.

In this action of tort, where the jury had returned a verdict against a husband and wife jointly, this court under the power conferred by St. 1913, c. 716, § 1, ordered that judgment be entered against the defendant husband and for the defendant wife.

TWO ACTIONS OF TORT under R. L. c. 102, § 146, the first action by a minor by his next friend against Edmund F. Leland and Eliza S. Leland, his wife, for injuries sustained by the plaintiff on July 24, 1914, when four years of age, by the bite of a dog alleged to have been owned or kept by the defendants or one of them, and the second action against the same defendants by the father of the plaintiff in the first case for expenses for medical attendance and nursing incurred by reason of his injuries. Writs dated April 28, 1915.

The declaration in each action, as amended, contained four counts. The first count alleged that the defendants were the owners of the dog. This count was waived by the plaintiffs at the trial. The second count alleged that the defendants were the keepers of the dog. The third count alleged that the defendant Edmund F. Leland was the keeper of the dog. The fourth count alleged that the defendant Eliza S. Leland was the keeper of the dog.

In the Superior Court the cases were tried together before *Keating, J.* It appeared that the plaintiff in the first case was playing on the lawn in front of his father's house in Burlington, when the dog came along, knocked him down and bit his lip. It did not appear how the dog got to Burlington. The evidence of the plaintiff on the question, who was the keeper of the dog, is described in the opinion. At the close of the plaintiffs' evidence the defendants moved that verdicts be ordered for them and each of them in both actions. The judge refused the motions.

The defendants then asked the judge to instruct the jury as follows:

"1. There is no evidence from which the jury can find that the dog was kept jointly by the defendants.

"2. There is no evidence from which the jury can find that the dog was kept by the defendant Eliza S. Leland.

"3. There is no evidence from which the jury can find that the dog was kept by the defendant Edmund F. Leland."

The judge refused to give any of these instructions and submitted the cases to the jury, submitting to them also two special questions, which with the answers of the jury were as follows:

"1. Was Edmund F. Leland keeper of the dog?" The jury answered, "Yes."

"2. Was Eliza S. Leland keeper of the dog?" The jury answered, "Yes."

In each of the cases the jury returned a general verdict against the defendants as joint keepers of the dog, assessing double damages in the first case in the sum of \$500 and assessing the damages in the second case in the sum of \$260. The defendants alleged exceptions.

F. H. Stewart, for the defendants.

M. G. Rogers, for the plaintiffs.

PIERCE, J. The principal question presented by the bill of exceptions is whether the jury was warranted in finding that the dog, which attacked and bit the minor plaintiff and severely injured him on July 24, 1914, was then kept jointly by the defendants, husband and wife. The defendants offered no evidence at the trial.

The dog had been given to an eleven year old son of the defendants in January or February, 1914, by a "social acquaintance" of the father, while the family were living at their home in Brookline. It was kept at that home until taken to a farm in North Andover in February, 1914, where the defendants had a summer home, to which, if the weather was fit, the family went by motor car on all holidays and very often on Saturdays and Sundays through the winter and spring. On the farm there was a cottage occupied by the foreman of the farm, one Burke, and his wife. To this cottage the dog generally came round after everybody went to work, and was always fed by Mrs. Burke. Burke was hired by the defendant Edmund F. Leland as foreman to superintend the running of the farm. He "had more leeway than a great many" foremen; he hired the laborers, boarded them and paid them and himself with money given him by Leland for that purpose. Mrs. Burke lived with her husband at the cottage; she was "manager of the house" where her husband worked. As regards her employment Leland testified: "I think she went with him [her husband], I did not have any arrangement with her." Burke testified "No, I received both pays" in response to the question "Did your wife receive any pay from Mr. Leland?" He further testified that Mr. Leland did not hire her, "he hired me." Notwithstanding the form of the last statement, we think the jury could properly find that the hiring of the husband was

intended to include and did embrace the services of the wife, with her consent, in a single wage.

The men employed by Burke looked after the live-stock and attended to their feeding, under the direction of Burke with an occasional suggestion from Leland who was not a practical farmer or "in a position to specify what an animal should have or what an animal should not have." Leland personally paid the expenses of running the farm, and also the household bills at the farm and at Brookline. His business kept him away a great deal, he spent very little time in daylight hours at the farm. The boy who owned the dog was at the farm on holidays and on Saturdays and Sundays during the winter and spring. He was there also from the seventh of June until the first of July but not afterwards, before the injury.

Mrs. Leland owned the farm. She had charge of the household servants and paid the maids in the house. She had nothing to do with the management of the farm. She never petted the dog, never fed it, never bought food for it, and told her son that she did not like the dog, did not care for it, did not want it round and wished he would get rid of it.

We are of opinion the evidence warranted a finding that the defendant Edmund F. Leland was the keeper of the dog. *Anderson v. Middlebrook*, 202 Mass. 506, 508, and cases cited.

We are also of opinion that the mere ownership of the farm by the wife, upon which the dog was kept by the husband, is not sufficient to raise an inference of joint keeping by the wife with the husband and thereby overcome the presumption of the exercise of dominant authority by the husband and of compliance by the wife. *Southworth v. Edmands*, 152 Mass. 203, 207.

We find nothing in the contention that the recital in the charge of the evidence relating to the acts of the several defendants was inaccurate and therefore prejudicial. Nor do we find any error in the instructions relating to the measure of damages. *Pressey v. Wirth*, 3 Allen, 191.

It follows that the exceptions must be sustained. In each case judgment is to be entered on the verdict against Edmund F. Leland and for the defendant Eliza S. Leland. St. 1913, c. 716, § 1.

So ordered.

JONAS H. VAUGHAN vs. WILLIAM P. MANSFIELD.

Middlesex. January 8, 1918. — February 26, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Husband and Wife. Agency. Evidence, Presumptions and burden of proof. Limitations, Statute of. Payment.

In an action by a physician for charges for services rendered to the wife and minor child of the defendant, where the evidence warrants a finding that the defendant had seen the plaintiff at the defendant's house and knew that the visits were made by the plaintiff as a physician in response to calls from the defendant's wife, and where there is no evidence that the defendant ever had forbidden the plaintiff to render or his wife or child in the plaintiff's presence to receive the services of the plaintiff on his account, the facts, that the defendant privately had instructed his wife never to run any bills and from time to time when she told him she needed it had given her money to pay all expenses, do not rebut the presumption of the agency of the wife, which is an inference from her relation to her husband as the manager of his household, to pledge her husband's credit for medical services that are reasonably necessary for her or the family, and therefore in such an action it is right for the presiding judge to refuse to rule at the request of the defendant "that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself."

In an action by a physician on an account annexed for charges for services rendered to the wife and minor child of the defendant, where the defendant had pleaded the statute of limitations and the plaintiff's claim was barred by the statute unless a certain payment of \$5, which was credited in the plaintiff's account, had been made to the plaintiff by or in behalf of the defendant at the date alleged, the plaintiff testified that "he had received a payment of \$5" on the account at the time alleged, but he offered no evidence to prove that the payment was made by the defendant, by the defendant's wife or by any one who had authority to act for the defendant. *Held*, that there was no evidence on which the jury could find an acknowledgment on the part of the defendant of an existing liability at the time of the alleged payment of \$5, and that they should have been instructed to that effect.

CONTRACT on an account annexed for \$116.06 for professional services as a physician, showing items of charges for medical attendance from November 24, 1903, to November 12, 1910, amounting to \$90.50, with a credit item of cash July, 1908, of \$5, leaving a balance of \$85.50, and with an item of \$30.56 for

interest, making a total of \$116.06. Writ in the First District Court of Eastern Middlesex dated October 24, 1913.

The defendant's answer, as amended, besides a general denial set up the statute of limitations, alleging that the plaintiff's cause of action did not accrue within six years from the date of the writ.

On appeal to the Superior Court the case was tried before *Keating, J.* The plaintiff testified that he had made the visits at the times and dates set forth in his declaration and made the charges for the separate visits as therein specified; that his first visit was on November 24, 1903, and his last visit was on November 12, 1910; that he received from the defendant \$25 in January, 1904; that he was unable to distinguish what visits were for the purpose of treating the defendant's wife, the child or the defendant himself; that he had been called by the defendant's wife on many of the occasions, but that on some of the occasions the defendant himself personally had called him to attend to the defendant's wife; that on the date set forth in his declaration he had received a payment of \$5 on this account; that he had sent bills from time to time to the defendant's residence through the mail, but that no other payments had been made. On cross-examination the plaintiff testified that he did not have the book in court with him on which the payment of \$5 was entered, but that he knew it was in July, 1908; that he gave the defendant credit for the money that was paid on this account; that he had never made any demand upon the defendant for payment of the bill except to send bills to the defendant's home address through the mail directed to the defendant, until 1912, and that he then knew that the defendant's wife had left the defendant and had left the country; that in 1912 he saw the defendant and asked him to pay the bill. On redirect examination he testified that so far as he knew on each occasion that he treated his family it was with the defendant's knowledge.

The defendant testified that between 1902 and 1911 he lived with his wife and minor child in a house in Everett opposite the house of the plaintiff; that he did not authorize his wife to contract a bill with the plaintiff; that he ran only one bill, and that was a grocery bill that he paid himself; that he had instructed his wife never to run any bills, that he did not want her to run bills; that he gave her money from time to time to pay all expenses,

and that she would tell him from time to time when she needed money and he would give it to her then, or, if he did not have it at the time of asking, later on; that he had no recollection of ever calling the plaintiff to attend his wife or child; that he had no recollection of ever being ill himself or consulting the plaintiff professionally; that he did not know of the existence of any claim of the plaintiff against him until 1912; that in 1910 his wife had left him and gone off with another man; that he obtained a divorce from her in 1911, and that in 1912 when the claim of the plaintiff first was brought to his knowledge his former wife was, so far as he knew, in California, married again and that he had never seen her from the time this claim was made upon him to the present day. On cross-examination the defendant testified that he did not always give money to his wife when she asked him for it, as he at times did not have it at that moment, but that he would give her money later on for proper bills; that he had seen the plaintiff in his house, but that he had no recollection of ever calling him there.

The judge instructed the jury in substance "that a husband is required to furnish necessities to his wife and minor child and he is liable for the necessities furnished to his wife and child when they live with him, and, if the plaintiff's services were necessary to the defendant's wife and minor child, the defendant would be liable for their reasonable cost." To this instruction the defendant excepted, and asked the judge in view of such instruction to instruct the jury further that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself. The judge refused to give this additional instruction, and the defendant excepted.

The judge further instructed the jury as follows:

"Now, the plaintiff says, in reference to the statute of limitations, that there was a part payment of the indebtedness to the plaintiff by the defendant in July, 1908, and that that part payment prevented the operation of the statute of limitations. So the question on this branch of the case for you to determine is: Was there a part payment made by the defendant or by his authority in July, 1908?

"The plaintiff testified from an entry he had made in his book

that that payment was made, and as I recall the testimony he gives the defendant credit for having made that payment. A receipt has been produced here by the defendant showing a payment, if I remember rightly, of \$25 in January, 1904. Was that payment in July, 1908, made by the defendant or by some one for him, by some one acting as his agent? If it was not, if it was made by some one who had no authority to make it for the defendant, then it would not be a payment by the defendant; but, if it was made by the defendant in July, 1908, then that payment is an acknowledgment by him of the existence of the indebtedness and it raises an implied promise on his part to pay the balance of the indebtedness. So you see, if you find that necessary medical services were rendered to the defendant, or his wife, or child while they were living together, and if you find that he made that payment in July, 1908, there would be due to the plaintiff the reasonable value of the medical services from 1904 to November, 1910; and, if you find that the reasonable value would be represented in dollars and cents at \$83.50, you will allow that as your verdict for the plaintiff." To this instruction the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of \$98.92; and the defendant alleged exceptions.

The case was submitted on briefs.

C. H. Stebbins & A. E. McCleary, for the defendant.

E. E. Spear, for the plaintiff.

PIERCE, J. It is not in dispute that the medical services for which the plaintiff seeks compensation were required by, and were rendered to, the wife and minor child of the defendant as alleged. The evidence warranted a finding that the defendant had seen the plaintiff at the defendant's house and that he knew the visits there were made by the plaintiff as a physician in response to calls from the wife of the defendant.

The defendant offered a receipt for \$25, tending to prove that he had paid an account which included as its last item the first item for services in the plaintiff's account. There was evidence that the plaintiff had sent bills from time to time to the defendant's residence through the mail. There was no evidence that the defendant ever had forbidden the plaintiff to render, or the wife or child in the presence of the plaintiff to receive, the services of the plaintiff on his account. *Alley v. Winn*, 134 Mass. 77, 78.

Dolan v. Brooks, 168 Mass. 350, 352. *Debenham v. Mellon*, 6 App. Cas. 24. *Harrison v. Grady*, 13 L. T. (N. S.) 369. *Baker v. Carter*, 83 Maine, 132. *Auringer v. Cochrane*, 225 Mass. 273. It follows that the charge in this regard was sufficiently favorable to the defendant and disposes of the exception of the defendant to the refusal to rule "that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself."

Under these circumstances the presumption of the agency of the wife, which is inferred from her relation to her husband as manager of the household, to pledge her husband's credit for medical services that are reasonably necessary for her or the family, is not rebutted by proof that the defendant privately had instructed his wife never to run any bills and had given her money from time to time to pay all expenses when she told him she needed it.

In answer to the defence that the action is barred by the statute of limitations, the plaintiff testified "he had received a payment of \$5" on the account in July, 1908. He offered no evidence to prove the payment was made by the defendant, by the wife of the defendant or by any one who had authority to act for the defendant. We are of opinion that this testimony went no further than proof of payment by a stranger and was insufficient as evidence for a jury to find an acknowledgment on the part of the defendant of a subsisting liability; and we think the jury should have been so instructed. *Gillingham v. Brown*, 178 Mass. 417. *Butler v. Price*, 115 Mass. 578. See *Palethorp v. Furnish*, 2 Esp. 511 n.

Exceptions sustained.

GUY SANTORO vs. SAMUEL L. BICKFORD.

Suffolk. January 9, 1918. — February 26, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Existence of relation. Motor Vehicle.

Where the general manager of a corporation conducting ten lunch rooms, whose duty it was to supervise the lunch rooms, lent a motor car owned by him to the assistant manager of the same corporation, whose duty it was to visit each of the ten lunch rooms daily and get from them the cash receipts of the day, and where, as the assistant manager was driving the car on one of these trips, he negligently injured a traveller on the highway, in an action brought by the injured traveller against the manager of the lunch rooms as the owner of the car, it was *held* that there was no evidence that the assistant manager was acting as the agent of the defendant in driving the car, both he and the defendant being servants and agents of the corporation in whose employ they acted in different capacities.

In the case above described the defendant testified that at the time of the accident the assistant manager was acting under his general direction and it appeared that the assistant manager reported the accident to the defendant, and it was *held* that this evidence did not tend to show that the assistant manager was acting as the agent of the defendant in driving the car for the purpose of collecting the daily cash receipts of the corporation that employed him. *Distinguishing Higgins v. Bickford*, 227 Mass. 52.

TORT for personal injuries sustained by the plaintiff on January 10, 1913, when the plaintiff lawfully was travelling on foot on Harrison Avenue in Boston near its intersection with Kneeland Street, from being knocked down and run over by a motor car belonging to the defendant driven by one Munroe, who was alleged to have been the servant or agent of the defendant. Writ dated January 22, 1913.

In the Superior Court the case was tried before *Chase, J.* There was evidence on which the jury could find that the plaintiff at the time of the accident was in the exercise of due care and that his injury was caused by the negligence of Munroe in operating the motor car. The defendant was called by the plaintiff as a witness. He testified that he was the general manager and vice president of a corporation called the Kelsey Company conducting in Boston ten lunch rooms known as the "Waldorf Lunch," and

that Munroe also was employed by the same corporation and was called the assistant manager. His testimony in regard to the respective duties of himself and Munroe is described in the opinion, where other evidence also is described.

At the close of the evidence the judge by agreement of the parties ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$2,500 with interest from the date of the verdict; otherwise, judgment was to be entered for the defendant on the verdict.

D. B. Jefferson, for the plaintiff.

C. S. Knowles, for the defendant.

CROSBY, J. The plaintiff, while a traveller on foot upon a public way, was struck and injured by a motor car owned by the defendant and operated by one Munroe. There was evidence from which the jury could have found that the plaintiff was in the exercise of due care and that his injuries were due to the negligence of Munroe. The only question presented is whether the jury would have been warranted in finding that Munroe was acting as the servant or agent of the defendant at the time of the accident.

The defendant was in the employ of the Kelsey Company as general manager and was its vice president. A part of his duties as general manager was the supervision of ten lunch rooms in Boston; in connection with that work he used the motor car which was operated by Munroe at the time of the accident. Munroe also was in the employ of the Kelsey Company as assistant manager, and there was evidence that it was his duty to go to the various lunch rooms every day or every night, get from them the cash receipts of the day and deliver them to the company at its main office. The defendant testified that he occasionally went round with Munroe when the receipts were collected "but that [it] was Munroe's business generally;" and that, "when Munroe made these trips round to the ten lunch rooms, he drove my automobile frequently and he was driving my automobile on one of these trips when this accident happened."

From the foregoing and the entire evidence, it is manifest that both the defendant and Munroe were servants and agents of the

company acting in different capacities; and, while at the time of the accident Munroe was using the defendant's car with the consent of the latter, there is no evidence whatever that at that time Munroe was acting as the servant or agent of the defendant; he was using the car while in the employ of the company in the performance of his duties as assistant manager. The testimony of the defendant, that at the time of the accident Munroe was acting under his (the defendant's) general directions, does not warrant a finding that he was in the employ of or acting for the defendant; nor was the fact that he reported the accident to the defendant evidence that he was the defendant's agent.

This court held in the case of *Higgins v. Bickford*, 227 Mass. 52, that similar evidence was not sufficient to charge the defendant with Munroe's negligence. In that case there was further evidence introduced upon the question of the defendant's responsibility for the acts of Munroe. The defendant in that case was asked: "'Bearing in mind his custom, is there any doubt in your mind that he was using it on your account that night?' the defendant replied, 'No doubt whatever in my mind but what that was what he was using it for.' 'On your account?' 'Yes, I suppose so.'" Upon the evidence quoted, together with the other evidence in the case, this court said that Munroe could be held to have been acting for the defendant. The evidence quoted and upon which it was decided that Munroe could be found to have acted as the defendant's agent in *Higgins v. Bickford*, *supra*, was lacking in the case at bar, and distinguishes it from that case and is decisive against the plaintiff's contention.

In accordance with the terms of the report the entry must be
Judgment for the defendant.

ANTON MIKKELSON *vs.* MICHAEL R. CONNOLLY.

JULI MIKKELSON *vs.* SAME.

Essex. January 11, 1918. — February 26, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Exceptions, Instruction to disregard certain evidence. *Evidence*, Admission by failure to produce certain evidence. *Witness*, Credibility, Failure to call.

Where at a trial of an action of tort evidence is offered by the plaintiff, against the objection of the defendant, of certain matters for which the plaintiff claims damages and the evidence, subject to the defendant's exception, is admitted, but afterwards the presiding judge tells the jury to disregard this evidence and again in his charge instructs them that the plaintiff can recover nothing for such matters, the rights of the defendant are protected fully, and his exception to the admission of the evidence cannot be sustained, because, if the evidence was admitted erroneously, the jury must have understood clearly that it was not to be considered.

In an action of tort, where it was material for the plaintiff to show that he had paid off a mortgage on personal property belonging to him held by the defendant as mortgagee, the failure of the defendant to produce his ledger, when called for by the plaintiff, is competent for the consideration of the jury, and, if the defendant contends that he cannot produce the ledger because it has been lost or destroyed, it is for the jury to say on the evidence whether the ledger could have been produced, and, if they find that it was within the power of the defendant to produce the ledger and he failed to do so, they may infer that, if produced, the ledger would not have supported the defendant's contention in regard to the account between the parties.

Where a witness for a party to an action has testified that he was in the employ of that party when the events to which he has testified occurred, it is right for the presiding judge to instruct the jury that they may consider the fact that the witness was in the employ of the party at the time referred to in determining the degree of credibility to be given to his testimony.

At the trial of an action of tort for the alleged wrongful taking of certain household furniture under the claim of a mortgage which the plaintiff contended had been paid and discharged, the evidence showed that the defendant employed a certain expressman to go to the plaintiff's house and remove the furniture, and the defendant did not call as witnesses the men employed by this expressman who took the furniture away. There was no evidence to show that the men were in the employ of that expressman at the time of the trial or that the defendant had any knowledge of them or their whereabouts or could have produced them as witnesses. There was no evidence that these men were within the control of either the plaintiff or the defendant. The presiding judge by his instructions to the jury allowed them to infer that the testimony of these men,

if they had been produced as witnesses, would have been unfavorable to the contention of the defendant. *Held*, that the instructions of the judge in this respect were erroneous and that an exception to this portion of his charge must be sustained, because under the circumstances shown no inference properly could have been drawn from the failure to call these witnesses that their testimony, if given, would have been favorable to the contention of either party.

TWO ACTIONS OF TORT respectively by a husband and wife for the alleged unlawful taking of household furniture belonging to the plaintiffs at their residence numbered 75 on Shepard Street in Lynn. Writs dated September 20, 1913.

In the Superior Court the cases were tried together before *Raymond, J.* The defendant claimed to be the owner under certain mortgages of the household furniture taken by him. The contentions of the respective parties are stated in the opinion. The jury returned a verdict for the plaintiff in the first case, Anton Mikkelson, in the sum of \$195 and returned a verdict for the plaintiff in the second case, Juli Mikkelson, in the sum of \$30. The defendant alleged exceptions, which are explained in the opinion.

R. L. Sisk, for the defendant.

G. E. Kemp, for the plaintiffs.

CROSBY, J. These are actions brought for the conversion of household furniture upon which the defendant held mortgages.

The plaintiffs' contention is that before the acts complained of were committed they agreed to pay the defendant the amount actually due upon the notes secured by the mortgages, but that the defendant refused to accept such amount, demanded a larger sum and afterwards forcibly took and carried away the household goods described in these actions.

The defendant contended that the plaintiffs had failed to pay the full amount of the debt secured by the mortgages and that he took possession of the goods at the request of the plaintiffs because they were unable to pay the amount due.

The cases are before us upon four exceptions taken by the defendant.

The exception to the admission of the evidence of the plaintiff Anton Mikkelson as to the care and attention given by him to his wife after the furniture had been removed need not be considered, as the presiding judge afterwards directed the jury to disregard it,

and again in the charge instructed them that the husband could not recover for such care of his wife. Under these circumstances, the rights of the defendant were fully protected. If the evidence was admitted erroneously, the jury must have clearly understood that it was not to be considered. *Morrison v. Richardson*, 194 Mass. 370, 377, 378.

The failure of the defendant to produce his ledger containing his account with the plaintiffs was competent for the consideration of the jury. Whether the ledger could have been produced, or was lost or destroyed, was for the jury to determine. If it was within the power of the defendant to produce it and he failed to do so it could have been inferred that, if produced, it would not have supported the claim of the defendant. The exception to the instruction of the judge upon this evidence cannot be sustained. *Eldridge v. Hawley*, 115 Mass. 410.

The instructions to the jury with reference to the testimony of the witness Phillips, who was formerly in the employ of the defendant, did not constitute error. Phillips testified that when the goods were removed from the plaintiffs' premises he was employed by the defendant as a collector, and that no objection to the removal of the goods was made by the plaintiffs. The jury were told, in substance, that they might consider the fact that Phillips was in the employ of the defendant at the time the events to which he testified occurred in determining the degree of credibility to be given to his testimony. This instruction was correct, and the exception to it must be overruled.

The remaining exception relates to that part of the charge in regard to the failure of the defendant to call as witnesses two expressmen who took the goods from the premises of the plaintiffs. The evidence showed that the defendant employed one Wright, an expressman, to go to the plaintiffs' house and remove the goods. There was no evidence to show that the men were in the employ of Wright at the time of the trial, or that the defendant had any knowledge of them or of their whereabouts or could have produced them as witnesses. There was no evidence that they were in the control of either the plaintiffs or the defendant. Under these circumstances, no inference properly could have been drawn that their testimony, if given, would have been favorable to the contention of either party. It follows that no inference properly

could be drawn against the defendant for his failure to produce them, and the instruction of the judge which allowed the jury to infer that their testimony, if offered, would have been unfavorable to the contention of the defendant, was error. The exception to the charge in this respect must be sustained. *Fitzpatrick v. Boston Elevated Railway*, 223 Mass. 475, and cases cited. *Little v. Massachusetts Northeastern Street Railway*, ante, 244.

Even if the nature of the transactions between the plaintiffs and the defendant as disclosed by the evidence might have tended to prejudice the defendant in the minds of the jury, still he was entitled to a fair trial conducted in accordance with the rules of evidence.

Exceptions sustained.

MAUD HAHN vs. EDGAR LOKER.

Middlesex. January 14, 1918. — February 26, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Attorney at Law. Agency, Scope of authority. *Judgment*, Satisfaction of.

An attorney at law has no authority to bind his client by assenting to the discharge from arrest of a judgment debtor of the client without payment in full of the judgment, unless it was done with the personal knowledge and consent of the client as judgment creditor.

In the present case, where an attorney at law acting for a judgment creditor assented, without authority to do so, to the release from arrest of the judgment debtor after he had been brought before a court and before any hearing had been had, it was *said* that it was not necessary to consider whether, if the judgment creditor had been bound by the act of his attorney, the release would have satisfied the judgment so that no action could be maintained upon it.

CONTRACT for \$513.14, upon a judgment recovered in an action of tort in the First District Court of Southern Middlesex, with costs and interest thereon. Writ in the First District Court of Southern Middlesex dated January 4, 1916.

The defendant's answer contained the following: "And further answering, this defendant says that on or about November 12, A. D. 1915, he was duly arrested upon the execution referred to in

the plaintiff's declaration, by a deputy sheriff of said county of Middlesex, George F. Leslie, and was thereafter on the same day voluntarily released from said arrest with the consent and by the order of the attorney for said Maud Hahn, wherefore this defendant says that said execution and judgment have been fully satisfied."

On appeal to the Superior Court the case was tried before *Chase, J.* It was admitted that the judgment had been recovered as alleged in the plaintiff's declaration and that the amount thereof with costs and interest was \$513.14. The defendant put in evidence a certified copy of the execution in the action of tort, bearing upon it the return of the deputy sheriff which is quoted in the opinion. It was admitted that the execution had not been satisfied except as appeared in the return.

The defendant asked the judge to rule that upon all the evidence as a matter of law the plaintiff was not entitled to recover. The judge refused to make this ruling and found for the plaintiff in the sum of \$513.14. The defendant alleged exceptions.

W. R. Bigelow, for the defendant.

S. R. Cutler, for the plaintiff.

CROSBY, J. The plaintiff recovered a judgment against the defendant in an action of tort; and on the execution issued thereon the defendant was arrested under the provisions of R. L. c. 168. The officer's return upon the execution is as follows:

"By virtue of this execution, and for want of goods, chattels lands or tenements, of the within named judgment debtor to be found by me, within my precinct, sufficient to satisfy the debt of the within named judgment creditor, I this day took the body of the said judgment debtor, Edward Loker, and had him in the court rooms of the Police Court of Newton in said County for a hearing before said court, and while waiting for the court to take up the case, by direction of Bernard F. Murphy, attorney for said judgment creditor, I left the said debtor Edward Loker, with his attorney, Mr. Bigelow, and the sureties for said hearings."

The present action is brought upon the judgment. It was admitted at the trial that the execution had not been satisfied "except as appeared in said return." The defendant contends that he was released by order of the creditor's attorney after he had been brought before the court, and before any hearing had

been had, and that such release amounted to a satisfaction of the judgment.

One decisive question is whether the judgment creditor would be bound by the action of his attorney in releasing the judgment debtor (if he was so released), in the absence of any evidence to show that such act of the attorney was with the personal knowledge and consent of the judgment creditor.

It is a general rule that "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action." *Moulton v. Bowker*, 115 Mass. 36, 40. He has power to release an attachment before judgment, and do many other things incidental to the proceedings and necessary or advisable for the interest of his client. *Moulton v. Bowker*, *supra*. *Shattuck v. Bill*, 142 Mass. 56, 63, 64.

Notwithstanding the broad discretionary power vested generally in an attorney, in behalf of his client to do whatever is reasonably necessary to obtain judgment and to collect it afterwards, he cannot, by virtue of his employment, acknowledge satisfaction of a judgment except by payment in full. *Lewis v. Gamage*, 1 Pick. 347. *Shores v. Caswell*, 13 Met. 413. *Brown v. Kendall*, 8 Allen, 209. *Shattuck v. Bill*, 142 Mass. 56, 63. Nor has an attorney authority to bind his client by the discharge of a debtor from arrest except on payment in full of the judgment. *Brown v. Kendall*, *supra*. *Simonton v. Barrell*, 21 Wend. 362. *Kellogg v. Gilbert*, 10 Johns. 220; S. C. 6 Am. Dec. 335. *Hall v. Presnell*, 157 N. C. 290, 293. *Pomeroy v. Prescott*, 106 Maine, 401.

In *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, at page 598, this court stated, "it is said that the weight of authority in this country seems to be against" the authority of an attorney at law by virtue of his employment to agree to a compromise of a suit out of court without his client's sanction. *Lewis v. Gamage*, *supra*. *Pomeroy v. Prescott*, *supra*. See also *New York, New Haven, & Hartford Railroad v. Martin*, 158 Mass. 313; *Brewer v. Casey*, 196 Mass. 384; *Gilman v. Cary*, 198 Mass. 318.

In the case at bar there is nothing to show that the plaintiff authorized or consented to the release of the judgment debtor, or

was present when he was so released, or that the plaintiff afterwards ratified the act of her attorney in this respect. Under these circumstances, the release of the judgment debtor is not a bar to the present action.

In view of the conclusion reached, it is unnecessary to decide whether the judgment would have been satisfied if the plaintiff had been bound by the act of her attorney. See *Crawford-Plummer Co. v. McCarthy*, 227 Mass. 350, and cases cited.

Exceptions overruled.

MICHAEL A. CAVANAUGH & another vs. D. W. RANLET COMPANY.

Suffolk. November 16, 1917. — February 27, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Sale, Warranty. Contract, Performance and breach, Rescission, What constitutes. Conflict of Laws. Frauds, Statute of. Waiver. Estoppel. Words, "Arrival."

Where, at the trial of an action for breach of a warranty of the quality of oats sold by the defendant to the plaintiff and to be delivered to the plaintiff at a city in New Hampshire, there is no evidence of the law of that State, the rights of the parties are to be determined at common law.

Where, at the trial of an action for a breach of a warranty of quality in an oral contract of sale to the plaintiff of four carloads of oats, it appears that three of the carloads were accepted by the plaintiff and were paid for, the statute of frauds is not a defence.

The mere facts, that a carload of oats was shipped by a bill of lading to the seller's order, that the bill of lading was indorsed by the seller and was attached to a draft upon the purchaser for the amount of the purchase price less the freight, and that the purchaser, without examining the contents of the car, paid the draft and received the carload, do not as a matter of law estop the purchaser from rescinding the sale upon discovering that the oats are not of the quality which he agreed to purchase, where there is evidence that, upon making such discovery, he notified the seller thereof and demanded back the purchase price; but the question, whether the purchaser waived the warranty, is to be determined as a question of fact.

A memorandum, sent by a seller to a purchaser and containing the terms of a proposed sale and the words "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire," and "If any error in above please advise by return mail," is an offer to sell the goods, upon an acceptance of which by the prospective purchaser a binding sale would arise.

It could not be ruled as a matter of law that the mere failure of the prospective purchaser to reply to the memorandum above described effected an acceptance so that a binding sale resulted, and, in an action on the alleged contract, it is for the jury to say whether under all the circumstances the silence of the alleged purchaser amounted to an assent.

Where, at the trial of an action for breach of a warranty of the quality of a carload of oats sold by the defendant to the plaintiff, to be delivered in a certain city, there is evidence upon which, under suitable instructions, the jury would have been warranted in finding that before the oats reached that city they were in a condition unfit for sale, it would be improper for the judge to order a verdict for the defendant although there was a provision of the contract of sale which required him to examine the oats and to notify the seller of any failure of them to conform to the warranty "not later than the following business day after arrival of the car at destination."

Upon the evidence at the trial above described, and under suitable instructions, it further was *held*, that the jury would have been warranted in finding that the word "arrival" in the rule above described was understood and intended by the parties to mean that, until the car had been detached and placed on a siding where it could be reached, inspected and unloaded in the course of the carrier's business, and notice had been given to the purchaser, possession was not taken by the purchaser and the time within which he should notify the seller of a breach of warranty had not begun to run.

Where, therefore, under such circumstances, there was further evidence warranting findings that the carrier made a mistake in placing the car where it still remained inaccessible, that, immediately upon rectification of such error, inspection by the purchaser followed, the breach of warranty was discovered and the seller was notified of that fact on the following day by telephone, it could not properly have been ruled as a matter of law that the defence of non-compliance by the purchaser with the rule above described, if that rule was a part of the contract of sale, had been proved.

CONTRACT, originally brought by Michael A., Thomas F. and James F. Cavanaugh, doing business as a copartnership under the name Cavanaugh Brothers, to whom afterwards was added as a plaintiff James Reid, with a declaration, as amended, in three counts. In the first count the plaintiffs alleged in substance that they purchased of the defendant a carload of straight clipped white oats that were guaranteed to be cool and sweet and paid the defendant therefor, but that the defendant never had delivered the oats to them. In the second count they alleged in substance that they and the defendant entered into an agreement whereby the defendant was to deliver to them two carloads of oats in August, 1912, and two carloads in December, 1912, for which they were to pay the defendant certain prices, respectively, less the freight on each car, by draft attached to the bill of lading; that the agreement was fully performed by both parties as to all excepting the

second carload; that the second carload arrived in the freight yard at Manchester, New Hampshire, where the plaintiffs were, in September, 1912, and that the plaintiffs were obliged to pay \$537.93 upon the draft attached to the bill of lading thereof without having had an opportunity to examine the contents of the car; that the contents were examined as soon as possible thereafter and were found to be in a condition not fit for use; that the plaintiffs thereupon immediately notified the defendant and demanded of the defendant the sum of money paid to it for the carload, but the defendant refused to repay such sum to the plaintiffs. In the third count the plaintiffs alleged that they paid to the defendant \$537.93 for which there was no consideration and that, although often requested to return such sum, the defendant had refused so to do. Writ dated December 1, 1914.

The answer, besides containing allegations of general denial and payment, set up the statute of frauds.

In the Superior Court the case was tried before *Keating, J.*

There was evidence introduced by the plaintiffs that one of them called the office of the defendant in Boston on the telephone, asked for the oats salesman, inquired how the market was on oats, was quoted a price for immediate shipment, ordered two cars to be delivered in a couple of weeks, when the defendant "could get them to us," and two for December shipment; that he had been buying oats from the defendant right along, and that it did not need much talk, because he was always getting what he bought; that he told the salesman that he wanted "number Two white oats, clipped white oats, to be cool and sweet," and was told that he could have them. The testimony of the defendant's salesman did not agree with this last statement. The salesman testified that nothing was said about the grain being cool and sweet.

After the telephone communication, the defendant sent by mail to the plaintiffs two papers, called in the record "confirmations," one referring to the cars for immediate shipment, and one to those for December shipment. These were received by the plaintiffs' bookkeeper. The plaintiffs' evidence tended to show that the bookkeeper said nothing to the plaintiffs about them. The paper referring to the carload in question in this action was as follows:

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CAVANAUGH v. D. W. RANLET CO.

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Established 1861.

Telephone, 1685 Fort Hill.

Incorporated 1906.

OFFICE OF
THE D. W. RANLET CO.
GRAIN AND FEED,
708 CHAMBER OF COMMERCE.

14378

Boston. 7/25/ 19 12

Sold to Cavanaugh Bros.

Manchester N.H.

2 Cars abt. 1500 Bus. cash

Ranlet Grade " 31/38 straight " clipped white oats

“ ”

Price 41 3/4 **Arr** cool & sweet

Time of Shipment August

Destination Manchester, N.H.

Line_____

Terms: Arrival

This sale subject to rules of Boston Chamber of Commerce governing trade in grain.

State or official board of trade, inspection and test weights shall be final.

This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire.

If any error in above please advise by return mail.

We thank you for the order.

Yours truly,

THE D. W. RANLET CO.,

Per Smith

The carload of oats in question was billed to the order of the defendant at Manchester, New Hampshire, and the bill of lading was indorsed by the defendant and was attached to a draft for the purchase price less the freight and the draft with the bill of lading attached was placed in a Boston bank for collection and was forwarded to a Manchester bank where the plaintiff Reid paid it and received the bill of lading.

Other evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant and reported the case for determination by this court, the parties having stipulated that if, upon the competent and admissible evidence, the ruling was right, judgment should be entered for the defendant; but, if upon the evidence the jury were warranted in returning a verdict for the plaintiff Reid, judgment was to be entered for the plaintiff in the sum of \$645.52.

It further was stipulated that it was to be made a part of the record that the plaintiffs Cavanaugh disclaimed any right, title or interest in the action and in the subject matter of the contract concerning which the action was brought, and assented to the maintenance of the action by the plaintiff Reid for his personal benefit.

After the trial of the case (it having appeared in evidence at the trial that the Boston and Maine Railroad had in its possession \$306.23, over and above its charges, from the sale of the car of oats in question), the parties by mutual agreement and with the express stipulation that it should be without prejudice in any event to either party, by joint order withdrew from the Boston and Maine Railroad and paid over to the plaintiffs that sum and the plaintiffs released the trustee to that extent, and it was agreed that in the event of a judgment for the plaintiffs that sum should be credited on the judgment, so that, in the event of judgment for the plaintiffs, execution should be issued in the sum of \$339.29 with interest from February 14, 1916, and costs.

F. J. Smith, for the plaintiffs.

A. T. Johnson, for the defendant.

BRALEY, J. The question for decision is whether the verdict for the defendant was ordered rightly.

It is undisputed that the plaintiffs doing business in Manchester, New Hampshire, purchased at an agreed price of the defendant

doing business in Boston, Massachusetts, as a wholesale jobber of grain which it bought and sold in car lots, four carloads of "clipped white oats, to be cool and sweet," delivery to be made at Manchester where the sale was consummated. But, as no evidence of the law of that State was introduced, the rights of the parties are to be determined at common law. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104.

The oral contract relied on by the plaintiffs being entire, and three cars having been accepted and the price paid, the statute of frauds is not a defence. *Roach v. Lane*, 226 Mass. 598. *Townsend v. Hargraves*, 118 Mass. 325.

A sale of goods by a particular description includes a warranty that the goods shall conform to the description, and counsel for the defendant makes no contention that the words "cool and sweet" are not words of warranty. *Gould v. Stein*, 149 Mass. 570. *Fullam v. Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476. *Gascoigne v. Cary Brick Co.* 217 Mass. 302. The defendant also never has denied that the oats in question which came in the second car were not soft and were in a general state of heat and fermentation when inspected by one Reid, a buyer from the plaintiffs of the shipment.

But, even if the draft for the price attached to the bill of lading, which Cavanaugh Brothers indorsed to Reid, was paid by him, no estoppel barring rescission arises. The jury were to decide whether the warranty had been waived by an acceptance of damaged goods, considered in connection with the undisputed fact, that notice was given to the defendant of the breach, with a claim for reclamation. *Trimount Lumber Co. v. Murdough*, ante, 254, and cases cited.

What has been said rests upon the oral contract, which, notwithstanding the defendant's denial, the jury could find resulted from the conversation by telephone between the contracting parties. The defendant however contends that the contract was in writing. The credibility of the witnesses was for the jury. It could be found that even if the exhibit, referred to in the record as a "confirmation," with the invoices of weight and condition had been mailed by the defendant and received by the bookkeeper, yet the plaintiffs never were shown the correspondence nor made acquainted with the contents. If this exhibit is examined, the

word "confirmation" is not found. It purports to be a memorandum of a sale of two cars "straight clipped white oats," one of which is the car in question, with a statement of the price, warranty and terms of shipment. It does not purport to confirm the oral contract. It is of itself an offer to sell which upon acceptance by the offerees would become a binding sale. The words, "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire. If any error in above please advise by return mail," immediately preceding the defendant's signature, admit of no other satisfactory construction. It could not be ruled as matter of law, that, if the "confirmation" were treated as an offer, it became a binding agreement from the failure of the plaintiffs to reply. The jury under all the circumstances were to say whether the plaintiffs' silence amounted to an assent. *Quintard v. Bacon*, 99 Mass. 185. *Borrowdale v. Bosworth*, 99 Mass. 378. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 391, 395. If the jury found the oral contract had not been established, then, if accepted by the plaintiffs, the "confirmation" would constitute the contract. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co. ubi supra*. But, if they found the oral contract had been proved, the further question, whether that contract had been mutually modified, rescinded or abandoned, was a question of fact under suitable instructions. *Hanson & Parker, Ltd. v. Wittenberg*, 205 Mass. 319, 326, and cases cited.

The defendant's next contention goes on the assumption that the "confirmation" is the contract. If so, the rules of the Boston Chamber of Commerce were incorporated by reference, whereby if the goods are not according to the warranty, the "Seller shall be notified not later than the following business day after arrival of car at destination, and be given an opportunity to order inspection, if so desired by him." And as the notice given was not within the designated time, the plaintiffs cannot recover. But the answer is, that on ample evidence the jury could say that the oats were in a damaged condition before the train entered Manchester. The buyers moreover were not bound to take the oats in whatever condition they might be in, and under appropriate instructions it could have been found that the word "arrival" appearing in the "confirmation," even if read with the rules, was

understood and intended by the parties to mean, that until the car had been detached and placed on a siding where it could be reached, inspected and unloaded in the course of the carrier's business and notice given to the plaintiffs or to their vendee, possession had not been taken and the warranty had not been waived nor discharged. *Alden v. Hart*, 161 Mass. 576. *Bachant v. Boston & Maine Railroad*, 187 Mass. 392, 393. *Garvan v. New York Central & Hudson River Railroad*, 210 Mass. 275, 280. *Pope v. Allis*, 115 U. S. 363. A finding also would have been warranted that, if at first the carrier made a mistake in placing the car where it still remained inaccessible, upon rectification of the error, inspection immediately followed, with notice to the defendant the following day by telephone of the condition of the oats and of non-acceptance. It is manifest without further comment that upon conflicting evidence and the inferences therefrom which the jury could draw the presiding judge could not properly rule that the defence had been maintained.

We perceive no reversible error in so far as argued to the admission of evidence to which the defendant excepted, and, the plaintiffs having been entitled to go to the jury on every material aspect of the case, the verdict cannot stand.

The defendant, however, if this is the result, raises no question of misjoinder. If for want of privity the plaintiff Reid could not have prevailed in an independent action, the report states, that the action is to be considered as if instituted in the name of the Cavanaughs for his sole benefit, and by agreement of parties if the case should have been submitted to the jury he is to have judgment for the amount therein stipulated with interest and costs. *Bryne v. Dorey*, 221 Mass. 399, 406.

So ordered.

FRANCIS I. AMORY & others, trustees, *vs.* TRUSTEES OF AMHERST
COLLEGE & others.

Suffolk. December 3, 4, 1917. — February 27, 1918.

Present: BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Trust, Construction, Validity, Resulting. Rule against Perpetuities. Deed, Construction. Estates on Condition. Evidence, Extrinsic affecting writings, Competency. Equity Jurisdiction, Statute of limitations, Laches. Limitations, Statute of. Agency, Scope of authority. Corporation, Officers and agents. Words, "On this condition."

The owner of certain real estate conveyed it to a college corporation in trust to use the income for the increase and benefit of a literary and benevolent fund of the college, previously established by the donor, subject to certain trusts, among which were requirements that one half of the income of the fund should be used for purposes of literature and that the other half of the income should be paid over to the grantor "or his nearest heir" of his name "for the time being, who shall demand it." *Held*, that the provision as to payment of one half of the income to the donor "or his nearest heir . . . for the time being" was void because in violation of the rule against perpetuities. Following *St. Paul's Church v. Attorney General*, 164 Mass. 188.

It also was *held* that the deed created two distinct trusts, one for the benefit of the college and the other for the benefit of the grantor and certain of his descendants; that the first trust remained valid although the second was invalid, and that, because of the invalidity of the second trust, the beneficial interest therein resulted to the grantor.

A deed of certain real estate to a college corporation with a direction that the income should be used for the increase of a certain fund contained recitals that it was in consideration in part of the grantee assenting to, agreeing and undertaking to execute "the several trusts hereinafter mentioned," and that the grantee was to hold "for the following uses and purposes" and "for the following uses, trusts, and objects," and "it is hereby declared to be the intention of the Donor, that the" college and its "Successors, shall be one Party, and that" the grantee "and his Representatives shall be the other party to the benefits of said Fund." There also were recitals to the effect that the college was entitled to one half of the income of the fund "on this condition," that it paid over the other one half to the donor or a designated heir, and that, if upon demand such payments were not made, then the fund and the property "shall thereupon be immediately forfeited to, revert to, and be reinvested in" the grantor "and his heirs forever." Upon a reading of the entire deed it was *held*, that it was the intention of the grantor to convey the real estate to the college corporation in fee simple in trust, and not to create an estate upon a condition subsequent.

Conditions subsequent are not favored in the law, and a deed will not be construed to create an estate on condition unless the language used necessarily

imports a condition or the intent of the grantor to create an estate on condition is indicated clearly and unequivocally.

Declarations and conduct of the officers of the college corporation and of the grantor in the deed above described made after the delivery of the deed and before the death of the grantor were considered in determining what was the meaning of the provisions of the deed which upon their face were doubtful.

In further construction of the deed above described, it was *held* that it plainly appeared that the parties did not intend that a mere use should be created to be executed under the statute, but that the college corporation should take an estate in fee in trust imposing active, diligent and continuing duties upon the trustee.

The statute of limitations will not begin to run to bar the rights of a beneficiary under a resulting trust as against the trustee until the trustee has repudiated the beneficiary's claim openly and notoriously.

In the case of the resulting trust above described, the statute of limitations did not begin to run in favor of the trustee and against the beneficiary at the time of the delivery of the deed creating the trust.

Upon the evidence before a master to whom was referred a bill in equity to enforce a resulting trust in land which had been conveyed to a trustee upon trusts, part of which were invalid, and upon certain facts found by the master, it was *held*, that the trustee to the knowledge of the beneficiary had repudiated the rights of the beneficiary about thirty-nine years before the beginning of the suit and had remained steadfast in that position, and therefore that the suit could not be maintained.

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, the master admitted in evidence letters written by the defendant's treasurer, bookkeeping entries made by him and statements sent by him to a representative of the beneficiary. It appeared that the authority of the treasurer was limited, and that he merely was custodian of the moneys and securities of the college, was empowered to collect term bills and other bills, to pay salaries and, incidentally, to keep proper books in connection therewith. *Held*, that the treasurer had no authority to bind the corporation by his letters, accounts, statements or bookkeeping entries, and that the evidence should not have been admitted.

In the suit above described, it appeared that the defendant repudiated all claims of the beneficiary in 1873 and ever thereafter treated the income of the fund as its own, that no assertion of a claim was made by the beneficiary until 1909 and no suit was brought until 1912. There was no evidence of any disability on the part of the plaintiff or of any of his predecessors in title nor was there apparent any reason for the delay in seeking his rights. Every one familiar with the facts relating to the trust had died. *Held*, that the suit was barred by laches.

By a deed containing many of the same provisions as those above described, a second parcel of land was conveyed to the college corporation with the provision that its income should be used entirely for the purchase of books for the college library until the termination of a lease to which the land was subject, which did not expire until 1928, at which time the income should be divided, one half being directed toward a valid object, and the other half toward one which was invalid. *Held*, that, as to the resulting trust arising under this deed, the statute

of limitations had not begun to run because the time had not yet arrived for the plaintiff to have possession.

It also was *held* that, the plaintiff not yet having a right to possession of this property last referred to, the bill must be dismissed as to that property also.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 1, 1912, against the corporation, the Trustees of Amherst College (hereinafter called Amherst College), David Sears and the Attorney General of the Commonwealth by the trustees under a declaration of trust, known as the David Sears Real Estate Trust, who claimed an undivided one half interest in two parcels of real estate and alleged that they were entitled to an accounting as to rents under the circumstances hereinafter described, as successor to David Sears, by virtue of the twentieth paragraph of his will, placing the residue of his real estate in trust, and a conveyance in 1889 by the trustees under the will through one Minot as a conduit to themselves.

David Sears was the common source of title of both the plaintiffs and the defendant college. The defendant college claimed under two deeds, dated, respectively, 1844 and 1847. The 1844 deed conveyed to Amherst College the legal title of certain property on the corner of Leverett and Barton Streets in Boston, together with the lessor's interest in a lease of that property expiring in 1928. The 1847 deed conveyed to Amherst College the legal title of certain property on Brattle Street in Boston, together with the lessor's interest in a lease of that property expiring in 1919. The plaintiffs contend that the conveyances made by these deeds of 1844 and 1847 to Amherst College were upon certain trusts, that those trusts were invalid in part by reason of an interest in the income given therein to David Sears or his nearest heir by the name of Sears for the time being who shall demand it, which was a violation of the rule against perpetuities, and that a trust resulted to David Sears and his heirs as to an undivided half of the fee of the Leverett Street property, subject to the lease expiring in 1928, and as to an undivided half of the fee of the Brattle Street property, including an undivided half of the lessor's interest in the lease expiring in 1919.

The suit was referred to a master upon the issues other than those relating to an accounting for rent. The material findings of the master, the evidence reported by him and the objections

and exceptions to his report by the defendant Amherst College are described in the opinion. The suit was reserved by *Crosby, J.*, upon the pleadings, the master's report and the exceptions thereto, for determination by the full court.

A. H. Wellman & C. M. Rogerson, (*S. H. Wellman* with them,) for the Trustees of Amherst College.

J. E. Hannigan, guardian *ad litem*, submitted a brief.

B. Corneau, (*W. E. Tucker* with him,) for the plaintiffs.

CROSBY, J. This is a bill in equity brought by the plaintiffs, who allege that they are the successors in title of the trustees of the residue of the real estate under the will of David Sears, to compel conveyance to them of an undivided half interest in each of two parcels of land in the city of Boston, alleged to be held by the defendants under a trust resulting in favor of David Sears (and the plaintiffs as his successors in title), by reason of the invalidity of certain provisions in the deeds conveying to the trustees of Amherst College the two parcels of land above referred to. The bill also prays for an accounting for one half of the rents received from one of the parcels; but no question is before the court on this prayer of the bill, as the order to the master by whom the case was heard limited the hearing to the questions of title.

The deed of the first parcel above referred to from David Sears to the Trustees of Amherst College is dated July 1, 1844, and conveys what will hereinafter be called the Leverett Street property, together with a lease thereof given to one Luther for one hundred years which will expire in the year 1928. The habendum clause of the deed is as follows:

"To Have and to Hold the same, to the said Trustees of Amherst College, and their Successors forever, for the objects nevertheless, and upon the conditions hereinafter written, — that is to say, to and for the following uses and purposes. In the first place the said Trustees of Amherst College, and their Successors, shall collect and receive the rents and profits of the above described estate, and shall annually during the continuance of the above mentioned lease to Philip Luther, and *no longer*, invest the same in the purchase of Books of General Literature, for the establishment, foundation, and increase of a Library appurtenant to this present endowment and for the use and benefit of the Students

of Amherst College. And on the termination of said lease to Philip Luther in the year of our Lord 1928, the said Trustees of Amherst College, and their successors, shall invest, and forever keep invested the rents and profits of said estate in the manner and for the purposes hereinafter described, and declared, namely, in some Funded, or Bank, or Insurance, or Rail Road Stock, or in other corporate property, or public securities, or in Mortgages, or in productive real estate, to increase and accumulate the permanent Capital of a Literary and Benevolent Fund, which the said David Sears, does by these presents create, found, and establish.

“And to give immediate activity to said Fund, and in addition to the grant of the above described estate the said David Sears with these presents also gives and pays over to the said Trustees of Amherst College the sum of Five thousand dollars, which they hereby acknowledge to have received, and do by [the acceptance of] these presents promise to invest as the commencement and foundation of said Fund subject to the conditions & limitations, and for the uses and objects in this deed recited and declared, and for the following uses, trusts, and objects namely, The said Trustees of Amherst College will immediately invest the said Five thousand dollars in some of the above named securities, and the same with its income and accumulations again invest, and keep invested, so as to constitute and make together with the above described Leverett and Barton Street estate, a Permanent Fund, under the above name of Literary and Benevolent. And the annual income of said Fund is to be invested and added to the Principal annually, between the months of July and January, to form a new Permanent Capital of said Fund, and when invested is not afterwards to be expended or used.—But in any year before the annual income is so invested, the parties who have the right, may demand, and shall receive their part of said income to be expended in such objects as to them may be most desirable, — without appeal, — and in such years, that half only of said annual income, not demanded, shall be funded.

“And it is hereby declared to be the intention of the Donor, that the said Trustees of Amherst College, and their Successors, shall be one Party, and that David Sears, the Founder of said

Fund, and his Representatives shall be the other party to the benefits of said Fund. And the Trustees of Amherst College, and their Successors, are hereby authorized and empowered to receive and expend the one half part of said annual income of said Fund in *such purposes of Literature*, without restriction, as they may deem most desirable, and including a right to build at their pleasure for the use and benefit of the Fund. Provided always, and they are entitled to half the income on this condition, that they pay over the other half part of said annual income, when demanded, to said David Sears and his Representatives designated and described in certain deeds of said David Sears to the Wardens and Vestry of St Pauls Church in Boston, dated in the year 1821, and establishing a Fund for Charitable and other uses. And if at any time hereafter it should so happen from any cause whatever that said income cannot be so paid over, or that any of said parties should be prevented, or prohibited, or in any way debarred from their several rights, or, if any of said parties as they become entitled to said income from said Fund should not receive the same within one year after demand thereof, then, and in each or either of said cases, the property conveyed by this deed, and the Fund herein referred to and established, together with all the property of every sort and description, which said Fund now has, or may hereafter become possessed of, shall thereupon be immediately forfeited to, revert to, and be reinvested in said David Sears and his heirs forever."

The deeds from Sears to the wardens and vestry of St. Paul's Church, dated 1821 and above referred to in the deed from Sears, provided that the rentals of the pews conveyed by these deeds should be applied to the accumulation of a permanent fund; and that the wardens and vestry "shall pay over to said Sears, or his nearest heir, by the name of Sears, for the time being, who shall demand it, the one half of said income [i. e., the income of the St. Paul's Church fund], for his, or her use and benefit, that is to say, any heir of said Sears, of his name, who may demand the said one half of said income, shall be entitled to receive it, but his or her right to it shall be superseded and annulled, whenever a nearer heir of the same name shall make a similar demand." By a subsequent deed to the same grantees he defined the phrase "nearest heir" as used in that and previous deeds, as being in

general to the effect that the eldest of male descendants should be preferred.

The second deed from Sears to the Trustees of Amherst College is dated September 1, 1847, and conveys a parcel of land situated in the city of Boston, hereinafter called the Brattle Street property. It also conveys and assigns to the grantees a lease of the land described to one Hinckley for one hundred years, which will expire in the year 1919. This deed referred to the earlier deed and to the undertaking of the grantees "to perform the several conditions, and comply with the several restrictions, and limitations, and execute the several trusts, uses, and objects, contained in this deed, in addition to, and in completion of their contract with said Sears, as the same appears recorded in said deed of the first of July 1844. . . . And the annual income received from the estate hereby granted, is forever to be a source, and afford a supply, — as a river affords a supply of water to the ocean, — by which the capital of said fund is to be annually increased, — and subject to the conditions, restrictions, limitations, and divisions of income, and forfeiture of said fund forever, — the same to be deemed and taken as a part of the original trust."

It will therefore be observed that, by the deed given in 1844, the entire rent received was to be expended by the college in the purchase of books during the term of the lease. This part of the gift is admitted to be valid. After the termination of the lease in 1928, the rents and profits are to be invested in securities to increase the permanent capital of a "Literary and Benevolent Fund," created by this deed and by a gift to the college of \$5,000, acknowledged in the first deed to have been received. One half of the income of the fund so established is to be invested and added to the principal annually, between the months of July and January, unless demanded by Sears or his representatives; the college being authorized to expend one half of the fund for the purposes of literature provided it paid over the other half, if demanded, to Sears or his nearest heir by the name of Sears for the time being, as described in the deeds of Sears to the wardens and vestry of St. Paul's Church, dated in the year 1821 and above referred to. The deed of 1844 also provides that if one half the income is not paid over to the parties entitled thereto,

within one year after demand, the property conveyed and the fund established shall be immediately "forfeited to, revert to, and be reinvested in said David Sears and his heirs forever." No claim of forfeiture under the foregoing provision is made by the plaintiffs. And as the term of the lease has not expired, they do not contend that they are entitled to any rents or profits received from the Leverett Street property.

The second deed, dated September 1, 1847, conveyed the Brattle Street property to be held for the increase and benefit of the Literary and Benevolent Fund, created by the deed of 1844. The rents and profits are to be invested to increase the principal of the fund and become a part of it, "subject to the conditions, restrictions, limitations, and divisions of income, and forfeiture of said fund forever, — the same to be deemed and taken as a part of the original trust." The entire income from this property has been added annually to the capital of the fund in accordance with the direction in the deed. Of the income from the capital of the fund, the college has received one half and the other half has been added to capital. The fund, by reason of the addition of one half of its income and of all the rents received from the Brattle Street property, has increased greatly in amount. The plaintiffs make no claim to the fund as such; as they are trustees only of the residuary real estate of David Sears, the grantor, they have no claim except to land and rent therefrom. In this suit they pray for an accounting for rents and profits received from the Brattle Street property since 1909, when they contend that they demanded the same. They also claim title to one undivided half of the fee in the Brattle Street property, and one undivided half of the reversionary interest in the Leverett Street property remaining after the termination of the lease to Luther.

In the case of *St. Paul's Church v. Attorney General*, 164 Mass. 188, upon which the plaintiffs largely rely, it was held that, in the deeds from David Sears above referred to conveying six pews to the wardens and vestry of St. Paul's Church, the provision for the payment of one half of the annual income of pew rents to Sears, the grantor, or his eldest male heir, on demand, was contrary to the rule against perpetuities, and that there was a resulting trust to the grantor and his heirs. That case is decisive of the present case in holding that the provision for the payments

to the grantor or his eldest male heir is contrary to the rule against perpetuities. The decision in that case also is decisive upon the question whether there is a resulting trust in the case at bar, unless the present case can be distinguished from the *St. Paul's Church* case on the ground that the differences in the deeds render that decision inapplicable. The differences which are principally relied on by the defendants in support of their contention are that the *St. Paul's Church* case was a bill for instructions brought by the plaintiffs as trustees, that the deeds there considered did not contain apt words to create a gift on condition with a right of entry for breach thereof, that the deeds considered in that case differ radically in language and in the intent expressed, and finally, that a different rule applies to a conveyance of real estate than applies to a conveyance of church pews.

We are of opinion that the differences in the deeds do not lead to any different results; and that the deeds under consideration, like the deeds in the *St. Paul's Church* case, must be construed as creating a resulting trust in Sears and his descendants in one half of each of the two parcels of land conveyed to the defendants.

It is plain that the gifts to the trustees for the uses of Amherst College created a valid charitable trust. It is equally plain that the accumulation of funds for the benefit of the grantor and his descendants named, was an invalid trust, the beneficial interest in which resulted to the donor. *St. Paul's Church v. Attorney General*, *supra*. *Nichols v. Allen*, 130 Mass. 211. The deeds properly construed created two distinct trusts: one for the benefit of the college, the other for the benefit of the grantor and his descendants named. The former was valid; the latter was invalid. *Dexter v. Harvard College*, 176 Mass. 192. *St. Paul's Church v. Attorney General*, *supra*. That a charitable gift was intended appears from the deeds. Accordingly the trust in favor of the college will be supported although the trust for the grantor and his representatives fails. *Jackson v. Phillips*, 14 Allen, 539, 556. *Sorresby v. Hollins*, 9 Mod. 221. *Curtis v. Hutton*, 14 Ves. 537. As the trust for the benefit of Sears and his heirs was invalid, the beneficial interest therein resulted to him. *Easterbrooks v. Tillinghast*, 5 Gray, 17, 21. *Nichols v. Allen*, *ubi supra*. *Olliffe v. Wells*, 130 Mass. 221. *St. Paul's Church v. Attorney General*, *supra*.

Teale v. Bishop of Derry, 168 Mass. 341. *Minot v. Attorney General*, 189 Mass. 176, 180. *Wilcox v. Attorney General*, 207 Mass. 198, 200.

The defendants do not deny that the provision in the deeds for Sears and his representatives violates the rule against perpetuities and is void to that extent, but they contend that, even if invalid in that respect, the deeds convey valid gifts of the lands therein described to the college; that the legal title so conveyed was a fee simple conditional, and that the condition and the right of entry have both disappeared, thus cutting off all right of the plaintiffs. In other words, it is the contention of the defendants that Sears intended to make a single completed gift to the college for its benefit, and to impose upon that gift provisions for the benefit of himself and his representatives; that the deeds conveyed both parcels to the trustees in fee simple subject to a common law condition, which has been discharged, and the property is held by the grantees and their successors free from any claim by the plaintiffs, or by Sears or his nearest heir by the name of Sears as above defined, or by his heirs at law or any other person. An important question is raised by this contention, similar to one referred to, but not decided, in the *St. Paul's Church* case. Undoubtedly there is language in the deeds which, taken by itself, would warrant the inference that it was the intention of the grantor to make gifts subject to a condition subsequent. *Brattle Square Church v. Grant*, 3 Gray, 142. But such, however, is not the necessary inference. In order to determine the true meaning of these deeds, they must be interpreted in view of all the language used to explain the intention of the grantor. *Episcopal City Mission v. Appleton*, 117 Mass. 326. *Sohier v. Trinity Church*, 109 Mass. 1. The words "on this condition," and in the provision relating to forfeiture in case of failure to pay when demanded, are words ordinarily used to create a condition, a breach of which will result in a forfeiture of the estate. But such will not be the effect if, taking the deeds as a whole, a contrary intention is manifested by the grantor. *McElroy v. McElroy*, 113 Mass. 509.

In the deed of 1844 it is recited that the real estate is conveyed in consideration in part of the grantees assenting to, agreeing and undertaking to execute "the several trusts hereinafter mentioned,"

and that the grantees are to hold "for the following uses and purposes," and "for the following uses, trusts, and objects," and "it is hereby declared to be the intention of the Donor, that the said Trustees of Amherst College, and their Successors, shall be one Party, and that David Sears, the Founder of said Fund, and his Representatives shall be the other party to the benefits of said Fund." The deed of 1847 recites that the conveyance is made in part in consideration of the grantees assenting to and agreeing to "execute the several trusts, uses, and objects, contained in this deed," and that "the same [is] to be deemed and taken as a part of the original trust." The foregoing and other language found in the deeds, together with the deeds as a whole, and especially in view of the objects sought to be accomplished, make it plain that it was the intention of the grantor to establish a trust rather than to convey the lands in fee subject to a common law condition. *Sohier v. Trinity Church, supra.* *Rawson v. Uxbridge School District*, 7 Allen, 125, 128. *Brattle Square Church v. Grant, supra.* *Austin v. Cambridgeport Parish*, 21 Pick. 215.

In *Rawson v. Uxbridge School District, supra*, it was said, "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument."

The evidence shows that the college accepted the property and administered it in accordance with the terms of the deeds until as late as at least 1871, when David Sears died, without raising any question as to the existence of a trust, and during all this period the letters from Sears to the representatives of the college show that he assumed and understood that such a trust had been created; and the master so finds. This finding was warranted. We do not mean to intimate that the true construction of the deeds, had it been expressed in clear and certain language, could be affected by letters written afterwards by Mr. Sears. It is well settled, however, that evidence of the construction put upon deeds

by the parties for a long period of time is entitled to weight. *Reynolds v. Boston Rubber Co.* 160 Mass. 240, 245, and cases cited. *Dakin v. Savage*, 172 Mass. 23, 27. Moreover, it is plain in this case, as in the St. Paul's Church case, that the trustees of the college admitted and recognized the existence of a trust as to the income of one half of the fund created for the benefit of the grantor and his representatives, up to at least the time of his death. During that long interval they made no claim that title was held adversely in themselves, but acted consistently with the view that they held in a trust capacity. At all times during the lifetime of the grantor, the conduct of the trustees shows that they believed the property to be held in trust, and it is apparent that Mr. Sears relied upon their acts and understood that it was so held, up to the time of his death.

As the deeds showed that the declared trusts were invalid because contrary to the rule against perpetuities, the college held with the assent of the grantor for different beneficiaries than those described in the deeds. This fact does not affect the validity of the trust. As was said by this court in the St. Paul's Church case, 164 Mass. 188, at page 200, "Where the possession of property is held by a trustee not by virtue of any personal right or personally asserted right on his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the *cestui que trust* is of very little importance, but the relationship is all important; and, so long as the relation of trust exists, it is a case of express trust, no matter who the *cestui que trust* may prove to be." *Patrick v. Simpson*, 24 Q. B. D. 128. *Warner v. Morse*, 149 Mass. 400. *Robinson v. Hook*, 4 Mason, 139, 152. *Cholmondeley v. Clinton*, 2 Jac. & W. 1.

It is also the contention of the defendants that any use resulting to Sears, the grantor, was executed by the statute of uses into a legal estate which has long since been barred by the statute of limitations. It is well settled in this Commonwealth that, whatever the form of conveyance, a deed should be so construed as to carry out the intent of the parties unless such construction is manifestly repugnant to the terms of the grant. *Dakin v. Savage*, 172 Mass. 23. *Carr v. Richardson*, 157 Mass. 576. It is unnecessary to consider the many fine and sometimes shadowy distinctions that have been made between uses and trusts under the

statute of uses, because we are of opinion that by each of the deeds in question it plainly appears the parties intended that the Trustees of Amherst College should take an estate in fee in trust and did not intend to create a mere use to be executed under the statute. The trust so created by these deeds reposed active, diligent and continuing duties in the trustee for the benefit of the grantor and his representatives, and clearly distinguishes the present case from those where a use declared is executed under the statute. Under such circumstances, the remedy of the *cestui que trust* to secure compliance with the trust is in equity. *Holland v. Cruft*, 3 Gray, 162, 175. *Richardson v. Stodder*, 100 Mass. 528. *Carr v. Richardson*, *supra*. *Packard v. Old Colony Railroad*, 168 Mass. 92. *Lima v. Cook*, 197 Mass. 11, 15. In view of the conclusion reached, that the deeds did not convey the property to the grantee subject to a common law condition, it follows that the conveyance from the trustees under the twentieth clause of the will to Minot in 1889, and before any breach of the condition and before entry, did not discharge the condition and vest in the college an absolute title in fee simple within the rule as stated in *Rice v. Boston & Worcester Railroad*, 12 Allen, 141. The college held by virtue of an express trust which it fully recognized and never repudiated during the lifetime of David Sears, the grantor. Nor can we agree with the contention that a merely dry and passive trust was created, and that therefore the right to enforce it has long since been barred by the statute of limitations.

The distinction between an express and an implied trust in this respect is well settled. As to an express trust, the statute will not run against the *cestui que trust* in favor of the trustee, unless the latter has openly and notoriously repudiated the claim of the former; while in the case of an implied trust the rule ordinarily is different. *Davis v. Coburn*, 128 Mass. 377. *Currier v. Studley*, 159 Mass. 17, 19, 20. *Sawyer v. Cook*, 188 Mass. 163. *Lufkin v. Jakeman*, 188 Mass. 528, 530. *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252. *Allen v. Stewart*, 214 Mass. 109. In the case at bar, the trust being an express, active and continuing trust, would prevent the running of the statute from the date of the delivery of the deeds. The duties of the trustees thereunder were to collect the rents, to pay over when demanded to the *cestuis que trust* one half of the income, and to make investments,

in accordance with the terms of the deeds, of the amount remaining; the right of Sears and his representatives to demand one half of the income to continue indefinitely, and that the college recognized its obligation to do these things, make it plain that it was an express, continuing, and active trust rather than one merely naked and passive in character, where the trustee has no duties to perform and simply holds the legal title. *St. Paul's Church v. Attorney General, supra. Salter v. Cavanagh*, 1 Dr. & Wal. 668. The case of *Churcher v. Martin*, 42 Ch. D. 312, cited by the defendants, is distinguishable from the case at bar.

The action of the trustees in collecting rents and applying them to purposes of the college was not adverse to the beneficiaries of the trust, but was in strict compliance therewith as understood by all parties in interest during the lifetime of the donor. David Sears never made demand for any of the income of the fund up to the time of his death — January 14, 1871. And the college raised no question as to the validity of those provisions of the deeds now agreed to be invalid, but assumed the existence of a trust and the validity of its provisions. Mr. Sears left several sons. The eldest, named David Sears, after the death of his father, made two demands for the payment of that portion of the income to which, assuming the provisions of the deeds of 1844 and 1847 to be valid, he was entitled. The first, made by letter dated July 10, 1872, and repeated by letter dated January 14, 1873, was afterwards waived. The second, was made by letter dated March 8, 1873, — six days before his death. No other demands were made upon the college for the payment of income until that of 1911 (hereafter spoken of) was made.

The first demand above referred to was originally contained in a letter directed to Edward Dickinson, the treasurer of the college; but it then was understood to be merely an inquiry, and was repeated later. At that time William A. Stearns was president of the college, and the letter was called to his attention. President Stearns wrote to Alpheus Hardy, a trustee of the college and a member of the finance committee, concerning the demand so made. His letter cannot be found; but one, dated January 31, 1873, evidently written by Hardy in reply, is in evidence, and states that the writer had seen Mr. Sears and that the latter "only asks,

as I understand him, the half of the interest for this year, and on, if he so elects." From this letter it is apparent that Hardy was satisfied that the demand of Sears was for future income and did not apply to that for the year ending July 31, 1872. That such was the nature of the demand made by Sears is confirmed by the letter of Hardy to President Stearns dated February 3, 1873, in which he wrote that he has seen Mr. Sears who "is in no hurry, he only wanted to name a date from which he should claim half the income." This construction of the nature of Sears's demand is also confirmed by his (Sears's) letter of March 8, 1873, to Treasurer Dickinson, which reads: "I request, that when the income is determined for this financial year, you will remit me the half of it." This plainly was a demand for future income, and raised the question whether the estate of the second David Sears was entitled, he having died on March 14, 1873. After his death, Mr. Hardy saw C. U. Cotting, administrator of the estate of the second David Sears, and wrote to the president of the college a letter dated May 7, 1873, as follows: "I saw Mr. Cotting this morning and convinced him that the late Mr. David Sears had no claim on our College for div'd in July — none having matured. I doubt if his son or heirs can legally call and doubt if he attempts it." No such claim was included in the inventory of the estate of David Sears, Jr., or accounted for by Cotting as administrator, and no payment of such income was ever made.

The evidence shows that Cotting acted as real estate agent for Sears, the grantor, when the two parcels of real estate out of which this controversy arises were conveyed to the trustees. He also acted in that capacity for the college and continued so to act until his death in 1903. After the death of the grantor, Cotting, as real estate agent, represented the trustees under the twentieth clause of the will of Mr. Sears, (through whom the plaintiffs claim,) and all of Sears's living descendants; and as previously stated, he was administrator of the estate of David Sears, Jr. Moreover, he was one of the original trustees of the trust of which the plaintiffs are members, and was its managing trustee until 1902. By reason of the various capacities in which he acted, he was without doubt thoroughly familiar with the relations between the college and the Sears family, the real estate in question, and all the parties in interest; we are satisfied that, in view of all the evidence as shown

by the record, Cotting was fully authorized to act for whoever was entitled to make demand for income from the college; in fact, such a demand was so made by him in his letter to treasurer Dickinson dated May 29, 1875.

And it is equally plain that Mr. Hardy, who during the period above referred to was a trustee of the college and a member of its finance committee and was in communication with the president of the college, as shown by the correspondence, was fully authorized to act for the trustees, with reference to the demand made by David Sears, Jr.

In view of the correspondence, the repeated conferences between Hardy, representing the college, and Sears, Jr., and with Cotting, and the entire evidence, the only reasonable inference to be drawn is that the college as early as at least the year 1873 had refused to recognize any demand made for the payment of income, and had taken the position that no one was entitled to such income other than the college itself. There is much evidence to show that Cotting, representing the Sears heirs, was inclined to agree with the view taken by the college, that it was not so chargeable. However that may be, it is plain that Cotting had notice of the position taken by the college; he had notice that no claim for income would be recognized, and that no demand therefor would be complied with, at least without litigation. It follows that there was a repudiation of the trust, and the assertion by the college of an adverse claim of which the *cestuis que trust* are chargeable with notice. In these circumstances, the statute of limitations began to run in favor of the trustees from the time they asserted adverse title with knowledge of the *cestuis*, unless the evidence shows that the college subsequently recognized the claim of the Sears heirs to demand a share of such income. *St. Paul's Church v. Attorney General, supra. Attorney General v. Federal Street Meeting-house*, 3 Gray, 1, 63.

The only facts in dispute before the master related to the questions whether the plaintiffs' demand was barred by the statute of limitations or by laches.

While it is well settled that the finding of a master, who heard the witnesses and had an opportunity to judge of their credibility, will not be set aside unless plainly wrong, that rule does not apply in this case, — where the entire admissible evidence is documen-

tary and undisputed, and is all before the court. Under such circumstances it is the right and duty of the court to decide the case upon the whole evidence. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138. *Old Corner Book Store v. Upham*, 194 Mass. 101, 106. *Rioux v. Cronin*, 222 Mass. 131, 134.

It is the contention of the plaintiffs that the college recognized the validity of the trust as late as 1883, and that there never has been any repudiation of it. On May 29, 1875, Cotting wrote to Treasurer Dickinson, "Since the death of Mr. David Sears the younger, there may be some question as to who should receive this Income, and as to the Fund generally, will you therefore consider that the one half of the Income is demanded from time to time by the Heirs and representatives of Mr. Sears and hold it until it is determined who is entitled to receive it." Later there was other correspondence between Cotting and Dickinson, and financial statements were sent by Dickinson to Cotting. On June 11, 1875, Hardy wrote to the president of the college as follows: "Yours of the 9th at hand. Enclosed are copies of all my letters relating to the Sears question, which is all I can say, except this, Mr. Cotting when talking with me regarding the question, after Mr. Sears' * death, gave me the impression that the *right to claim*, on the part of Mr. David Sears Sen's heirs, died with the death of Mr. D. Sears Jr. That however is a legal question about which *lawyers* may disagree. . . ." On October 13, 1875, Cotting wrote Dickinson for a definite answer to his letter of May 29, and Dickinson replied that he would refer the matter to the trustees, who would probably appoint a committee to confer with Cotting. He afterwards wrote Cotting that such a committee had been appointed; and several times, he arranged for the committee or President Stearns or himself to meet Mr. Cotting. There is no record of the appointment of such a committee, nor is there any evidence of who were on it or that it, or any one authorized to represent the college, ever had a conference with Cotting upon the subject matter referred to in his letter of May 29.

In 1876 Dickinson wrote Cotting and sent him a statement of the account of the fund which includes the item " $\frac{1}{2}$ income for

* The initials D S Jr are interlined above the words Mr. Sears.

the year ending July 1, 1875 \$574.47 subject to order of Mr. Sears' heirs." During the years 1877 and 1878, one half the yearly income appears in the accounts as a balance on hand.

In January, 1879, a new account was opened by the treasurer entitled "Sears Cash Capital and Sears Brattle Street Fund Supplement." To this account were credited annually, one half of the income from the "Sears Cash Capital Fund" which previously had been added to the capital of that fund, and one half of the income from the "Brattle Street Fund" which previously had been added to that fund. It appears, as stated by the master, that when this new account was opened in January, 1879, there were transferred to it a sum equivalent to one half of the income of the "Sears Cash Capital Fund" for the preceding four years, and a sum equivalent to one half of the income from the "Brattle Street Fund" for the preceding four years. These items were taken from the respective income accounts of the "Sears Cash Capital Fund" and the "Brattle Street Fund," where, for the four preceding years, they had been carried forward as income balances instead of being added as usual to capital. The new account opened in 1879, was closed out in 1883 under the direction of the trustees of the college by the following vote:

"Voted that the "Sears Cash Capital & Brattle Street Supplement Fund" so called, be merged with the respective funds from which it was derived according to the contributions of each, excepting such part thereof "with its accumulations" as might have been expended for current annual expenses."

The effect of the change in 1883 was to put back the items where they would have been if the new account had never been opened. There is no evidence that Mr. Cotting or the Sears heirs ever knew of the new account which was kept from 1879 to 1883; nor is there evidence that the trustees of the college authorized the opening of this account, or were aware of its existence until it was ordered closed by their vote in 1883. Annual accounts of the fund were sent by the treasurer to Cotting from 1875 until 1880 (except for the year 1879). From 1880 down to 1911 no accounts have been rendered and no demand has been made upon the college by any one, nor has any inquiry concerning the fund been made during that period. The first intimation of a claim upon

the college by the plaintiffs is contained in a letter dated June 10, 1909, stating in substance that claim would be made; thereafter, on September 27, 1911, the plaintiffs demanded one half of the fee in each of the two parcels of real estate in question, and this suit was brought in 1912.

The letters written by Dickinson, as well as the bookkeeping entries made by him and the statements sent by him to Cotting, were admitted by the master subject to the exception of the defendants. All this evidence was inadmissible and should have been excluded. There is nothing to indicate that these matters were ever brought to the attention of the trustees or were known by any one authorized to act for the college. The by-laws show that Dickinson's authority was limited. He was custodian of the moneys and securities of the college and was empowered to collect term bills and other bills, to pay salaries, and, incidentally, to keep proper books in connection therewith. He was not a trustee and had no authority to bind the college by the letters, accounts, and bookkeeping entries above referred to; and there is no evidence that his acts were ever ratified by the college. *Craig Silver Co. v. Smith*, 163 Mass. 262. Cook on Corp. § 717.

Apart from the Dickinson letters, bookkeeping entries, and accounts sent to Cotting (and which were improperly admitted), nothing warrants a finding that the college, since 1873, ever recognized its liability to account to the Sears heirs or any one else for any part of the trust fund. The evidence shows that during that year the college repudiated the trust, and that such action was known by Cotting who acted for the *cestuis que trust*. It follows that the plaintiffs' demand has long since been barred by the statute of limitations.

There is no evidence that any accounts were rendered after 1880, or that any communication, verbal or written, was received from any one until the letter of 1909 was sent by the plaintiffs' agent to the trustees. It therefore appears that for nearly twenty-nine years all intercourse between the parties had ceased, during which time the college had openly remained in full possession of the property and had appropriated for its own uses all the income therefrom. As the testimony offered to rebut repudiation of the trust was inadmissible, it follows that the statute of limitations began to run when in 1873 the college denied its liability to

account, and Cotting as representative of the Sears heirs had notice of such action.

Aside from the statute of limitations, we are of opinion that the plaintiffs' claim is barred by laches. No claim was made by them until 1909, no formal demand was made until 1911, and this suit was not brought until the following year. There is no evidence that the plaintiffs or their predecessors labored under any disability at any time. The testimony shows that every one who was familiar with the facts concerning the trust or matters connected therewith has deceased, that many of the corporate records, books of account, and treasurer's books have been destroyed by fires which occurred in 1882 and 1888, that in the meantime the position of the college has been changed, and that the property has greatly increased in value. In view of these facts, and as the college has not since 1873 recognized the trust but has treated the property as if no such trust existed, and no cause appears for the great delay on the part of the plaintiffs and their predecessors in asserting their claim, they are shown to be guilty of laches, which bars them from equitable relief. *Sawyer v. Cook*, 188 Mass. 163. *Doane v. Preston*, 183 Mass. 569. *Speidel v. Henrici*, 120 U. S. 377, 387. *Hammond v. Hopkins*, 143 U. S. 224. *Patterson v. Hewitt*, 195 U. S. 309. *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 175.

Although the statute of limitations and laches constitute a bar to the maintenance of the bill for the recovery of either an undivided half part of the Brattle Street property or any part of the income therefrom, it does not follow that the trust is terminated as to the Leverett Street property. That property still remains subject to a resulting trust in favor of the plaintiffs, who will not be entitled to any part of the income therefrom until the expiration of the Luther lease in 1928; it being provided in the deed from Sears to the trustees given in 1844 that the college is entitled to receive the whole of the rents from this property for the purchase of books for the college library during the term of the lease. Consequently, there never has been a time when the plaintiffs or their predecessors were entitled to recover any portion of such rents. And as the right of possession has not accrued the statutory period of limitation has not begun to run. R. L. c. 202, §§ 20-30.

The defendants saved forty-four exceptions to the master's

report, to his findings, and to the admission and exclusion of evidence. They need not be considered in detail. Exceptions nine to twenty-nine inclusive, relating to the admission in evidence of the letters exchanged between Dickinson and Cotting, the book-keeping entries kept by Dickinson, and the accounts sent by him to Cotting, are sustained for the reasons previously stated. The exceptions which are contrary to the conclusions we have reached, are overruled. The others have become immaterial.

It follows that the entry must be

Bill dismissed.

PATRICK MCGOVERN & another vs. CITY OF BOSTON.

Suffolk. January 7, 1918. — February 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Contract, Incorporation of statute, Construction, Implied in law, Rescission. Boston Transit Commission. Public Officer. Municipal Corporations, Officers and agents. Equity Jurisdiction, For rescission of contract, Mistake. Boston.

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract.

In making such a contract in the name of the city, the members of the Boston transit commission act as public servants and not as servants or agents of the city.

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which bids for the work were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract.

If, to procure as low a bid as possible from the contractor, the members of the commission wilfully misled and deceived him as to material facts and concealed the true state of affairs from him, so that he was led to make a contract for a sum too small, the city is not responsible for such misconduct on the part of the members of the commission, who are public officers, and such misconduct is no ground for a rescission of the contract.

By reason of the requirement of St. 1911, c. 741, § 17, that contracts for work in the construction of certain tunnels and railways in Boston, among them the Dorchester tunnel, which involve \$2,000 or more in amount, shall be in writing and signed by a majority of the Boston transit commission, a con-

tractor cannot recover from the city upon a *quantum meruit* for a sum in excess of \$2,000 for work done and labor and materials furnished in the construction of a section of the Dorchester tunnel, where he contends that the contract in writing for such work, entered into between him and the city through the Boston transit commission, was invalid.

Although St. 1911, c. 741, § 17, does not expressly prohibit recovery from the city upon an implied contract under the circumstances above described, it is the only reasonable inference from its provision that all contracts coming within its terms must be in writing.

A bill in equity by a contractor against the city of Boston which alleges that a contract made by him with the city through the Boston transit commission for the construction of a section of the Dorchester tunnel was procured through negligence of the commission in not accurately ascertaining and stating to him the character of the work to be done and through wilful deception and fraud of the commission in misstating the facts, and which seeks a rescission of the contract, cannot be maintained as a bill for a cancellation of the contract by reason of a mutual mistake.

Whether under the circumstances a bill in equity to cancel the contract because of a mutual mistake of the contractor and the commission would lie, was not considered.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 28, 1917, for a rescission of a contract entered into by the plaintiffs and the defendant, acting by the Boston transit commission, for the construction of a section of the Dorchester tunnel, so called, after the work had been completed by the plaintiffs, and for a recovery upon a *quantum meruit* for work done and labor and materials furnished.

The defendant demurred to the bill. The demurrer was heard and was sustained by *Carroll, J.*, who reported the case to the full court for determination, with a stipulation that, if the full court should overrule the demurrer, the defendant was to answer over and the cause was to be heard upon the merits, and, if the full court should sustain the demurrer, a decree was to be entered dismissing the bill unless the court should thereafter allow an amendment to the bill.

J. F. Cronan, (*C. L. Smerdon* with him,) for the plaintiffs.

G. A. Flynn, (*C. E. Fay* with him,) for the defendant.

CROSBY, J. This is a bill in equity brought to rescind a completed contract made by the plaintiffs with the Boston transit commission for the construction of Section E of the Dorchester tunnel, so called, and to recover the value of the work done on a *quantum meruit*. The defendant's demurrer to the bill was sustained by a single justice, who reported the case to this court.

The Boston transit commission was created, and its duties were defined by St. 1894, c. 548, and acts in addition and amendment thereto. The contract in question was authorized by St. 1911, c. 741, and was dated December 16, 1914. Thereafter the plaintiffs completed the contract according to its terms.

The plaintiffs allege that, after the completion of the work, they learned that the boring plans submitted by the transit commission did not show the true character of the material which it would be necessary to excavate and remove; that some of the borings indicated ledge as found in certain locations; that such borings were not shown on the plans but were wilfully concealed by the commission from the plaintiffs; that some of the borings were made with improper and insufficient tools; that the chief engineer of the commission knew or ought to have known that ledge was encountered by the borings; and that the omission from the boring plans of borings showing ledge was for the purpose of deceiving bidders as to the nature of the materials to be removed and to secure at a low cost the performance of the work. And they contend that, by reason of such concealment on the part of the commission, they were put to an additional expense of approximately \$240,000 in the performance of the contract, which they seek to recover.

In answer to these allegations the defendant contends, among other things, that the statement on the plans relating to the character of the materials which had to be removed in the performance of the work, were expressions of opinion and were not representations of fact; and that, if the plaintiffs were not willing to accept and be bound by the opinions of engineers of the commission, it was their duty to request an opportunity to examine the boring samples upon which the opinions so expressed were based or to make their own borings. *Winston v. Pittsfield*, 221 Mass. 356.

The statute under which the contract was authorized (St. 1911, c. 741) provides in § 17 as follows:

“The commission may make contracts in the name of the city for the work herein authorized, but all contracts involving \$2,000 or more in amount shall be in writing and signed by a majority of the commission; and no such contract shall be altered except by an instrument in writing, signed by the contractor and a majority of the commission, and also by the sureties, if

any, on the bond given by the contractor for the completion of the original contract. No such contract, and no alteration of any such contract, shall be valid or binding on the city unless executed in the manner aforesaid."

The provision in the statute that all contracts involving \$2,000 or more in amount shall be in writing and signed by a majority of the commission, manifestly was intended by the Legislature to protect the city of Boston from the uncertainty and danger of oral contracts involving large amounts, and from hasty and ill-advised action. A contract in writing, expressed in clear and certain language, free from ambiguity, would relieve the city from the dangers attendant upon contracts, the scope and effect of which might depend wholly upon verbal talk, subject to different interpretations in view of the language used by the parties. Statutes, city charters and ordinances relating to municipalities, containing similar provisions, have often been upheld as reasonable and proper safeguards of binding force upon municipalities and their officers and agents, as well as upon those who contract with them. *United States Drainage & Irrigation Co. v. Medford*, 225 Mass. 467, 472. *Fiske v. Worcester*, 219 Mass. 428. *McLean v. Holyoke*, 216 Mass. 62. *Sullivan v. Mandell*, 212 Mass. 174. *Commercial Wharf Corp. v. Boston*, 208 Mass. 482. The plaintiffs are chargeable with knowledge of the provisions of § 17 and are bound by its terms. *Fiske v. Worcester, supra*.

The members of the Boston transit commission, in making the contract in question under § 17 above quoted, were not servants or agents of the city, but acted as public officers. As such, the city is not liable for their negligence. *Stewart v. Hugh Nawn Contracting Co.* 223 Mass. 525. *Murphy v. Hugh Nawn Contracting Co.* 223 Mass. 404. *Codman v. Crocker*, 203 Mass. 146, 154. *Mahoney v. Boston*, 171 Mass. 427. See also *Bolster v. Lawrence*, 225 Mass. 387. Nor is a municipality liable for the misconduct of its public officers. *Johnson v. Somerville*, 195 Mass. 370. *Heiser v. New York*, 104 N. Y. 68.

As the city cannot be chargeable upon an express contract entered into in contravention of the statute, it is equally plain that no recovery can be had upon an implied contract: to permit such recovery would be to defeat one of the purposes for which the statute was enacted. To allow the plaintiffs to recover upon

a *quantum meruit* would be contrary to the spirit as well as to the letter of the statute, and would be in plain disregard of its terms. *Bartlett v. Lowell*, 201 Mass. 151. The statute evidently was enacted to safeguard the interests of the defendant; it cannot be evaded or annulled, and must be held to be in full force and effect. Nor can it be regarded as permissive rather than mandatory, or as vesting in the commission a discretionary power to disregard its clearly expressed intent.

The contention of the plaintiffs, that as there is no express prohibition in the statute that the defendant shall not be charged with work otherwise than under a contract in writing such prohibition cannot reasonably be inferred, cannot be sustained, as the only reasonable inference is that all contracts coming within its terms must be in writing. And the plaintiffs are not entitled to recover under the doctrine of *Hayward v. Leonard*, 7 Pick. 180, and cases decided upon similar grounds. *Atkins v. Barnstable*, 97 Mass. 428. *Reed v. Scituate*, 7 Allen, 141. *Walker v. Orange*, 16 Gray, 193. Such cases are clearly distinguishable from the case at bar. Nor are they entitled to recover upon a *quantum meruit* because the defendant has had the benefit of the work. *Douglas v. Lowell*, 194 Mass. 268, 275, and cases cited. The case at bar is not within the principle discussed in *Long v. Athol*, 196 Mass. 497.

The bill cannot be maintained based on mutual mistake. Such is not the ground alleged for relief, and we do not mean to intimate that a bill would lie if brought on that ground. The allegations are not sufficient to warrant a cancellation of the contract or to permit the plaintiffs to recover upon an implied contract. The statute (§ 17) which provides that all contracts involving \$2,000 or more in amount shall be in writing, is of equal force and effect in a suit in equity as in an action at law.

In view of the conclusion reached, — that the bill is demurrable and cannot be maintained, and that because of the statute there can be no recovery, — we have not deemed it necessary to consider many other questions presented by the record. The demurrer was sustained rightly, and in accordance with the terms of the report, a decree is to be entered dismissing the bill unless an amendment to it shall be allowed by the court.

So ordered.

BAY STATE STREET RAILWAY COMPANY vs. PUBLIC SERVICE
COMMISSIONERS & others.

Suffolk. January 7, 1918. — February 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Grade Crossing. Public Service Commission. Lynn.

The rulings or orders of a State board or commission, to review, annul, modify or amend which jurisdiction in equity is given to the Supreme Judicial Court by St. 1906, c. 463, Part III, § 157, and by St. 1913, c. 784, § 27, are such rulings or orders as are made by the board or commission acting as such.

The public service commission, in making an apportionment of costs incurred by reason of the changes at Silsbee Street in Lynn under St. 1912, c. 492, § 15, in connection with the abolition of grade crossings of highways with the railroad, was substituted in place of the special commission provided for in St. 1906, c. 463, Part I, § 29; and orders and rulings made by them in making such an apportionment were not orders and rulings made by them as a State board or commission.

The Supreme Judicial Court has no jurisdiction in equity under St. 1906, c. 463, Part III, § 157, or under St. 1913, c. 784, § 27, to review, annul, modify or amend an order or ruling made by the public service commission when acting as a special commission under St. 1912, c. 492, § 15, as above described.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 16, 1916, and afterwards amended, against the members of the public service commission, the Boston and Maine Railroad, the city of Lynn and the Commonwealth to have annulled a ruling and order of the public service commission directing the plaintiff to pay part of the cost incurred in the work upon Silsbee Street in Lynn as a part of the work connected with the abolition of grade crossings in Lynn under the provisions of Sts. 1890, c. 428, § 1; 1912, c. 492.

The defendants severally demurred. The demurrers were heard by *Pierce, J.*, and were sustained, and a final decree was entered dismissing the petition. The plaintiff appealed.

The case was submitted on briefs.

E. W. Burdett, for the plaintiff.

H. C. Atthwill, Attorney General, & *H. W. Barnum*, Assistant Attorney General, for the public service commissioners.

H. F. Hurlburt, & *H. F. Hurlburt, Jr.*, for the Boston and Maine Railroad.

CROSBY, J. On June 26, 1901, a petition was filed in the Superior Court for the county of Essex by the mayor and aldermen of the city of Lynn, for the appointment of a special commission for the abolition of certain grade crossings in Lynn. The petition was filed under the provisions of St. 1890, c. 428, § 1, (now St. 1906, c. 463, Part I, § 29). A commission was duly appointed; its report after amendment was accepted by the court on June 30, 1909, and the Boston and Maine Railroad was ordered to proceed with the work in accordance with the report. The parties bound by the decree made upon the commission's report are the Commonwealth, the city of Lynn, the Boston and Maine Railroad, and the Boston and Northern Street Railway Company, now the Bay State Street Railway Company.

Before the work was commenced, Silsbee Street in Lynn was carried over the tracks of the railroad on a bridge; under the decree the tracks of the railroad were to be raised to pass over the former grade crossings at Central Square, Silsbee Street was to be discontinued within the railroad location, and in substitution therefor a foot passageway beneath the tracks was ordered. The commission apportioned the cost among the parties in interest.

After the work of the abolition of the crossings in accordance with the decree was begun, St. 1912, c. 492, was enacted. This statute provided for certain modifications in the amended report of the special commission. Sections 14 and 15 related to the reconstruction of Silsbee Street, and the apportionment of the cost thereof. The modification of the plan made by § 14 required the building of an underpass for foot passengers, teams and vehicles in place of a passageway for foot passengers as provided by the decree of the special commission, at an additional expense which necessitated an apportionment under § 15 by the board of railroad commissioners.

The plaintiff requested the public service commission to rule that it was not liable for the payment of the cost involved in the work required to be done upon Silsbee Street, under St. 1912, c. 492, § 14, which request was refused; and an order was adopted by the public service commission (the successor of the board of railroad commissioners) apportioning the cost as required by § 15 by which seven and one half per cent of such cost was apportioned to the plaintiff.

The plaintiff contends that it has no location or track in that part of Silsbee Street occupied by the railroad and, therefore, under St. 1906, c. 463, Part I, § 29, it is not properly a party to the proceedings and cannot be assessed for any part of that work. In this proceeding it seeks to have the ruling and order of the defendant commission annulled, and contends that jurisdiction exists in this court for that purpose under St. 1906, c. 463, Part III, §§ 155, 157, and also by virtue of St. 1913, c. 784, § 27. Demurrers to the bill filed by the defendants were sustained by a single justice, and a final decree has been entered dismissing the bill. The case is before us upon an appeal from the decree.

Under St. 1906, c. 463, Part I, § 29, the commission "shall, if the parties so agree, consist of the members of the board of railroad commissioners, and they shall serve without compensation other than their official salaries." Under St. 1912, c. 492, which relates to the abolition of grade crossings in the city of Lynn, the board of railroad commissioners were designated as the commission to act. The effect of St. 1912, c. 492, made compulsory what, under St. 1906, c. 463, Part I, § 29, would have been possible only by agreement of parties. It was not the intent of the Legislature in enacting St. 1912, c. 492, to affect or impair the provisions of St. 1906, c. 463, except so far as the same were expressly changed by the later statute. The commission is required to file its report in the Superior Court for confirmation in accordance with St. 1906, c. 463, Part I, § 36, which chapter and section are expressly declared in St. 1912, c. 492, § 15, to apply except as otherwise specifically provided, and there is no other specific provision to be found in the later act. Under § 15 the cost of the work, as well as the apportionment, is to be made in accordance with the general statute relating to the abolition of grade crossings. St. 1906, c. 463.

The plaintiff contends that jurisdiction in equity is conferred by virtue of St. 1906, c. 463, Part III, §§ 155, 157, and also by St. 1913, c. 784, § 27. Section 155 requires every State board and commission to keep a record of its proceedings in any matter considered by it under the laws relating to street railways, and to rule upon all requests made by any party before it for a ruling of law.

Section 157 confers upon the Supreme Judicial Court or the

Superior Court jurisdiction in equity upon the petition of a street railway company, or of the board of aldermen of a city, or the selectmen of a town in which the street railway is located, or of any interested party, to restrain the violation of laws which govern street railway companies, and of orders, rules and regulations made in accordance with the provisions of the chapter of which it is a part, by the board of aldermen of the city, the selectmen of a town or the board of railroad commissioners, and "to review, annul, modify or amend the rulings of any State board or commission relative to street railways as law and justice may require."

St. 1913, c. 784, § 27, is in part as follows: "The Supreme Judicial Court shall have jurisdiction in equity to review, annul, modify or amend any rulings or orders of the commission which are unlawful to the extent only of such unlawfulness." It is plain that under the above statutes the rulings and orders therein referred to made by a State board or commission are such rulings or orders as are made by the board or commission acting as such.

In making the apportionment of costs involved by reason of the changes required at Silsbee Street under St. 1912, c. 492, § 15, the commission was substituted in place of the special commission provided for in the grade crossing act of 1906, and under § 15 of St. 1912, the commission is "limited in deciding such proportionate apportionments by the provisions of said chapter four hundred and sixty-three." In other words, the public service commission in apportioning the costs of the work at Silsbee Street, have the same powers and are subject to the same provisions of the statutes as when acting as commissioners by agreement of parties. St. 1906, c. 463, Part I, § 29.

In making the apportionment of costs, the acts of the public service commission, like the acts of a special commission, are subject to review, and if unlawful may be corrected by appeal in the Superior Court. St. 1906, c. 463, Part I, § 34.

A careful reading of the statutes in question makes it plain that it was the intention of the Legislature when it enacted St. 1912, c. 492, that the board of railroad commissioners in apportioning the costs should be governed by the statutes then in force relating to the abolition of grade crossings. St. 1906, c. 463.

The proceedings authorized by St. 1906, c. 463, Part III, §§ 155, 157, and by St. 1913, c. 784, § 27, relate to orders and

rulings of the commission acting as such, and do not authorize a review of the orders of the commission acting under St. 1912, c. 492, § 15, in substitution of a special commission under St. 1906, c. 463.

Decree affirmed.

CHARLES J. DELAMAINÉ vs. INHABITANTS OF REVERE.

Suffolk. January 8, 1918. — February 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Sewer, Surface drainage. Municipal Corporations. Way, Public. Nuisance.

A drain, laid out by the board of sewer commissioners of a town without a vote of the town, which was built by a contractor under the direction of the superintendent of sewers of the town and was constructed "to take care of the surface water" of a particular part of one street only of the town, is not a main drain within the meaning of R. L. c. 49, §§ 1, 3, and the town is not liable at common law for injuries resulting to a traveller upon the way due to a negligent placing of an improper cover over one of its catch basins.

A town is not liable at common law for personal injuries received by a traveller upon a public way and caused by ignorance or negligence of the board of sewer commissioners of the town in their determination of the location of a main drain or a catch basin or of the form or pattern of a catch basin cover.

A town is not liable at common law for personal injuries resulting to a traveller upon a public way and due to his crutch slipping through the cover of a drain concealed by newspapers which the town officials had permitted to be sold in the streets and by circulars which they had permitted to be distributed in the streets even though it was reasonably certain that the papers and circulars would be thrown into the streets and would accumulate in places to which they might be driven by the wind.

TORT for personal injuries received by the plaintiff, when he was walking on Ocean Avenue near Beach Street in Revere, by reason of a crutch which he was using passing through an opening in a drain cover which was concealed by papers, circulars and refuse. Writ dated August 9, 1911.

In the Superior Court the case was tried before *Fessenden, J.* The material evidence is described in the opinion. The jury, in reply to a special question, found that the damages sustained by the plaintiff were \$2,000. The judge ordered a verdict for the defendant and reported the case to this court for determination

upon these conditions: If the judge's action in ordering a verdict for the defendant was wrong, final judgment was to be entered for the plaintiff in the sum of \$2,000 damages; if it was right, judgment was to be entered for the defendant.

J. W. Allen, (*H. W. Packer* with him,) for the plaintiff.

A. A. Casassa, for the defendant, submitted a brief.

PIERCE, J. This is an action of tort to recover for injuries sustained on May 31, 1911, near the intersection of Beach Street and Ocean Avenue in the town of Revere, by reason of the plaintiff's crutch passing through an opening in a drain cover which was concealed by paper and circulars and refuse which had collected.

The drain referred to was constructed for the purpose of taking care of the surface water in the streets, and it had nothing to do with the sewers of the town of Revere. It was laid out as an extension of the drain at the corner of Ocean Avenue and Beach Street in 1899, without a vote of the town, by the board of sewer commissioners. It was built in 1899 by a contractor, under the direction of the superintendent of sewers, in accordance with a plan which stated that "The work to be done is to lay 162 feet of 8-inch drain pipe and build the catch basin; town to furnish pipe, C. B. covers and bricks, and contractor to furnish all other materials and do everything to construct the drain to the entire satisfaction of the superintendent of sewers" The sewer commissioners selected the particular kind of cover for the drain or grating. *Emery v. Lowell*, 104 Mass. 13. The superintendent of sewers and the engineer of the town determined the particular location of the pipe and catch basins. The catch basin in front of the drug store at the corner of Ocean Avenue and Beach Street was there when the drain was constructed. The catch basin cover selected by the sewer commissioners and placed upon the catch basin by the superintendent of sewers, was about two feet square with holes two and three eighths inches by two and one half inches, and a diagonal width of about three and three eighths inches. The cover was placed next to the sidewalk at the corner of the avenue and street. "The top of the drain was put in at a grade with the gutter, or perhaps — possibly a slight — never over an inch below, so that the water running along the gutter would run on and into the catch basin, through these holes in the catch basin cover."

There was no hole in the curbstone and, other than the grating, there was nothing to indicate the presence of an opening to a catch basin or drain. There was no evidence that the cover in its position near the curbstone in itself was defective, out of place, or an obstruction to travel.

On the day of the injury and on other occasions, newspapers, dodgers, circulars and handbills, distributed by boys with the active or passive assent of town officials, thrown away, littered streets, sidewalks and gutters, and at the time of the injury covered and concealed the grating.

There was evidence to warrant a finding that the officials of the town in charge of the ways knew of the general, daily distribution of newspapers and circulars and knew that they were likely to be cast into the streets and blown about to the annoyance of people unless steps were taken to regulate such disposition and to clean up the refuse and fugitive papers. There was also evidence to warrant a finding that the officials of the town knew of the collection of papers in the gutter, where the accident happened, on the day of the injury in season to have removed them from the gutter and grating.

Because no notice in writing of the time, place and cause of the accident ever was given to the defendant, it is unnecessary to determine on the foregoing facts whether the hole in the catch basin cover, or the hole and refuse paper in combination, constituted a defect in the travelled way for which the town was liable. See *Upham v. Boston*, 187 Mass. 220; *Campbell v. Boston*, 189 Mass. 7; *Moymihan v. Holyoke*, 193 Mass. 26; *Connor v. Manchester*, 73 N. H. 233.

The plaintiff puts his case on the contention that the catch basin cover was a part of a common drain which the town owned and maintained for gain under the authority of R. L. c. 49 §§1, 3; that the location of the drain with a catch basin and cover at a place which frequently would result in the partial or complete concealment was evidence of the negligent adoption of a plan which was obviously defective; that the defendant was negligent in not adopting a grating recognized by general use in other communities as ordinarily safe, and that the town was liable for negligently failing to keep its streets clean.

The first contention is shortly disposed of by the fact, clearly

shown by uncontradicted testimony, that the drain is not a main drain within the meaning of the statute, but is merely a drain "to take care of the surface water" of a particular part of Ocean Avenue. A defect in such a drain is a defect in surface drainage for which a town is not liable. *Walcott v. Swampscott*, 1 Allen, 101. *Bates v. Westborough*, 151 Mass. 174, 183.

But if it were a main drain, the town is not liable for any harm to the plaintiff as the result of the ignorance or negligence of the board of sewer commissioners in the determination of the location of the drain, of the catch basin and of the form or pattern of the catch basin cover. *Child v. Boston*, 4 Allen, 41. *Emery v. Lowell*, 104 Mass. 13. And there is no evidence that the injury to the plaintiff resulted from any neglect of the town to construct the drain and its connections with reasonable care and skill in the location, and in accordance with the plan of the commissioners. Nor is there any evidence of a failure of the town to keep and maintain the drain and its connections in repair. *Emery v. Lowell, supra*. *Merrifield v. Worcester*, 110 Mass. 216.

It is plain that the town is not liable for the maintenance of a nuisance arising from the acquiescence of its officers in permitting the sale of newspapers and the distribution of circulars in its streets, even though it be reasonably certain that the papers will be thrown into the streets and will accumulate in places where they may be driven by the wind. See *Tindley v. Salem*, 137 Mass. 171; *Cole v. Newburyport*, 129 Mass. 594; *Pierce v. New Bedford*, 129 Mass. 534; *Kerr v. Brookline*, 208 Mass. 190.

We think the verdict properly was directed for the defendant. It follows, in accordance with the terms of the report, that judgment is to be entered for the defendant.

So ordered.

HENRY OSTERBRINK'S (dependents') CASE.

Suffolk. January 9, 1918. — February 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workman's Compensation Act.

A man, who was employed as a door-tender to stand outside the door of the cooling room of a pork packer to open the door when persons passed in or out, was accustomed in warm weather to keep a bottle of drinking water under a sink or tank in the cooling room, because there was no other convenient way of getting drinking water in that part of the building for his luncheon. For some time this door-tender and other employees, with the knowledge of the foreman, had had bottles of tea and coffee which were placed in the cooling room to be kept cool for use with their meals, and this was permitted by the superintendent and by the management, although the practice of the door-tender of placing a bottle of drinking water under the sink in the cooling room for his personal use was not known to the superintendent or to the management. On a morning in July the door-tender went into the cooling room, took a bottle from under the sink and drank from it, supposing it to be his bottle of water. The bottle contained muriatic acid and had been left there by the tinsmith employees of the pork packer, who had been doing some soldering. The acid caused the death of the door-tender, and his dependent next of kin made a claim for compensation under the workmen's compensation act. *Held*, that a finding was warranted that the death of the employee resulted from an injury arising out of and in the course of his employment.

In the claim above described it also was *held*, that there was no error in ordering the insurer to pay to the two surviving partly dependent daughters of the deceased employee equal sums of money, there having been ample evidence to support the findings as to the partial dependency of each of the daughters upon the money which was contributed each week by the deceased employee to the family fund for the support of the family.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, §11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to the two surviving daughters of Henry Osterbrink, late of the part of Boston called Dorchester, as his dependent next of kin, he having been at the time of his death on July 7, 1916, in the employ of John P. Squire and Company, pork packers.

The case was heard by *Wait*, J. The material part of the evidence is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board,

ordering the insurer to pay the sum of \$3.15 each week for a period of five hundred weeks from July 7, 1916, to Anna T. Osterbrink and to pay a like sum each week during the same period to Mary J. Osterbrink.

The insurer appealed.

F. Hutchinson & P. B. Smith, for the insurer.

W. H. Sullivan, for the dependents.

PIERCE, J. The deceased was seventy-two years of age, a faithful worker, a person of exemplary habits, and one who never took a drink of liquor of any kind. He was employed as door-tender by the subscriber. It was his duty to stand outside the door to the cooling room and to open that door to the men when anyone wanted to pass in or out with a truck. His duties began at seven o'clock in the morning, and he was expected to tend the door until relieved.

The temperature in the vestibule where he stood was in July the same as out doors while that in the refrigerating room was at or near freezing. There was a bubble fountain on the floor below from which employees could drink water. There was no provision for drinking water on the floor on which the deceased was stationed. There were two faucets in the cooling room with hose attached; there was not any drinking cup. Some of the men, when working in the refrigerating room, drank from a hose-pipe attached to a faucet at the sink or tank, and some used a small tin pail or can hung near the sink by some of the men for this purpose. The deceased at times drank from the rubber pipe and pail as the other men did. The hose-pipe was attached to the faucet in order to clean and flush the sink or the products placed therein as well as adjacent places.

For some time before and on July 7, 1916, the day of the injury, the deceased had kept water for his use in drinking in a bottle, which he placed for cooling on the floor of the cooler under the sink or tank near the wall. During the same time he and other employees, with the knowledge of the foreman, had bottles out of which they drank tea or coffee with their lunch. Bottles of tea or coffee were at times placed by some employees in the cooling room to be kept cool for use with the meals. The practice of putting bottles of tea or coffee in the cooler was known and permitted by the superintendent and the management; the practice of plac-

ing a bottle of drinking water under the sink in the cooler for the personal use of the deceased was not known to the superintendent or to the management.

At about half past nine o'clock of the morning of July 7, 1916, the deceased went into the cooler, took a bottle from under the tank and drank from it. The bottle contained muriatic acid, and the injury that followed the draught resulted in the death of the deceased. The deceased mistook the bottle containing muriatic acid, which he took from under the sink for his bottle of drinking water which he kept under the sink in or near the same place. The evidence warranted the finding that the bottle of acid had been left by tinsmith employees of the subscriber from their work in soldering, and does not support the contention that it was maliciously or in joke substituted by a tinsmith for the bottle of the deceased.

We are of opinion there was a causal connection between the employment and the accident. The placing of bottles of coffee or tea in the cooler had the sanction and approval of the subscriber. There is no evidence that it disapproved the cooling of water in bottles in the refrigerator, and it would be a natural and reasonable expectation that employees would place water in bottles in the cooler in summer time to relieve the thirst of the employees or to be drunk by them with their meals, in preference to drinking from the end of a rubber tube or from a bubble fountain after going to the floor below. We are also of opinion that the risk of drinking acid from a bottle which had been exchanged or substituted for a bottle of like appearance containing drinking water by an employee, whose work required the use of such a substance, was not too remote a danger to be found to be an incident of that employment. See *Hutchison v. M'Kinnon*, [1916] 1 A. C. 471; *Archibald v. Ott*, 77 W. Va. 448.

The insurer contends that there was error in ordering the insurer to pay to the two surviving partially dependent daughters equal sums, and claims that under St. 1911, c. 751, Part II, § 7, which reads "if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency," "there must be evidence that the deceased contributed such and such an amount of money to Anna and such and such an

amount of money to Mary." The evidence was ample to support the findings as to the partial dependency of each of the daughters upon the sum of money which was contributed each week to the family fund for the support of the family.

Decree affirmed.

EDWARD G. DEWOLFE vs. CARRIE A. ROBERTS & others.

Middlesex. February 5, 1918. — February 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Conspiracy. Landlord and Tenant, Tenancy at will. Summary Process. Evidence, Materiality. Practice, Civil, Exceptions.

In an action by a physician for an alleged unlawful conspiracy to injure the plaintiff by evicting him from the house in which he lived and had his office as a tenant at will of one of the defendants, the defendants other than the landlord were a constable to whom the landlord made a lease to terminate the plaintiff's tenancy at will and a real estate agent who obtained tenants for the defendant landlord. The plaintiff owed rent to the defendant landlord. The landlord was one of the owners of the house, who had authority to make the lease to the constable. The constable brought a summary process under R. L. c. 181, § 1, and obtained a judgment for the possession of the house. *Held*, that there was no evidence for the jury that the defendants conspired to do any unlawful act or do any lawful act by unlawful means.

In the above described case it was *pointed out* that the defendant landlord had a right to terminate the plaintiff's tenancy upon the advice and with the assistance of the other defendants, that the landlord's motive in exercising this right was immaterial and that it did not matter whether he terminated the tenancy because of ill will toward the plaintiff or merely because the plaintiff had failed to pay the rent that was due.

In the case above described it also was *held* that questions addressed to the defendant landlord as to whether he intended that the constable should occupy the premises and whether he had agreed to let the house to another person when the plaintiff had moved out properly were excluded as immaterial, and also that a question addressed to the defendant constable as to whether in an action brought by him against the present plaintiff for rent he had testified that the lease was a "cover" lease and that "we did not want [the present plaintiff] to know" was excluded properly, it having no tendency to prove the conspiracy alleged.

In the same case it was *pointed out* that, as a verdict for the plaintiff would not have been warranted, the exclusion of evidence relating to damages was immaterial.

TORT by a physician against Carrie A. Roberts, in control of a two-family house numbered 629 on Main Street in Malden,

Charles M. Josselyn, a real estate agent, and Frank A. McAllister, a constable, alleging a conspiracy to injure the plaintiff by evicting the plaintiff from the lower tenement of the house, where he lived with his wife and had an office for practising medicine, the declaration being described further in the opinion. Writ dated September 19, 1916.

In the Superior Court the case was tried before *Morton, J.* The material facts shown by the evidence are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions, including certain exceptions to the exclusion of evidence which are mentioned in the opinion.

J. L. Sheehan, (F. W. Miller, Jr., with him,) for the plaintiff.

A. P. Stone, for the defendants.

CROSBY, J. In September, 1915, and for about three years previously, the plaintiff occupied as a tenant at will a tenement owned in part by the defendant Roberts. From February, 1915, up to September 7 following, the rent due from the plaintiff was in arrears; and on the latter date the defendant Roberts, for the purpose of terminating the tenancy, executed a lease in writing to the defendant McAllister, who was a constable. McAllister served a notice on the plaintiff to vacate the premises, and afterwards brought a summary process under R. L. c. 181, § 1, and obtained judgment against him for possession; the plaintiff vacated the premises the day before execution for possession was issued.

The defendant Josselyn was a real estate agent who secured tenants for the defendant Roberts at different times.

The plaintiff's declaration is in three counts, each of which in substance alleges that the defendants conspired to injure him by evicting him from the house in which he lived and had his office.

The plaintiff contends that the second count is a count for malicious prosecution. While it contains some allegations appropriate for such a count, it is apparent that it is founded upon an alleged conspiracy entered into by the defendants to evict him from the tenement. The declaration states that all the counts are for one and the same cause of action; and there is nothing in the record to show that it was not treated as an action for conspiracy rather than an action for malicious prosecution. If the second count could be regarded as alleging a malicious prosecution,

we do not mean to intimate that there was evidence sufficient to warrant a verdict for the plaintiff.

An allegation of conspiracy will not support this action unless the purpose intended or the means by which it was to be accomplished are tortious. *Bowen v. Matheson*, 14 Allen, 499. *O'Callaghan v. Cronan*, 121 Mass. 114. *Groustra v. Bourges*, 141 Mass. 7.

The allegation of conspiracy is not the gist of the action and the right to recovery must rest upon damages wrongfully inflicted by tortious acts of the defendants, either as the end intended or the means adopted to accomplish an end. *Parker v. Huntington*, 2 Gray, 124, 127. *Gurney v. Tenney*, 197 Mass. 457, 465.

A careful examination of the evidence shows that a finding that there was a conspiracy between the defendants to eject the plaintiff from the premises would not have been warranted. The defendant Roberts, as one of the owners, had a right to lease the premises to McAllister for the purpose of terminating the plaintiff's tenancy, and it is unimportant whether she did it because of ill will toward him or because he had failed to pay the rent due; her motives were immaterial. She could terminate the tenancy upon the advice and with the assistance of the other defendants without liability to the plaintiff if the means by which it was accomplished are not shown to be unlawful. The undisputed facts are that, while the plaintiff as a tenant at will was owing her rent, the defendant Roberts executed the lease in question to McAllister — as she had a right to do — and that the latter resorted only to proper legal processes to obtain possession of the premises. Under these circumstances, the presiding judge rightly directed the jury to return a verdict for the defendants. If the purpose of the defendant Roberts was to terminate the plaintiff's tenancy because she believed he had been circulating stories about her (even if she were mistaken in that belief), such purpose would not be evidence of a conspiracy, in the absence of evidence that it was sought to be accomplished by unlawful means. *Groustra v. Bourges*, *supra*. *Plant v. Woods*, 176 Mass. 492, 499. *Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co.* 202 Mass. 177, 184. The testimony in regard to the conversation between the defendant Roberts and the witnesses Richards and Black would not warrant a finding that the defendants had entered into a conspiracy to eject the plaintiff from the premises.

The action brought by McAllister against this plaintiff in 1916 upon a claim for rent was brought, so far as the record shows, without any knowledge on the part of either the defendant Josselyn or the defendant Roberts and was not evidence of a conspiracy.

The exceptions to the exclusion of evidence may be disposed of briefly. The question to the defendant Roberts as to whether she intended that McAllister should occupy the premises, was immaterial; she had the legal right to lease the premises to him even if her sole purpose was to terminate the tenancy of the plaintiff. *Groustra v. Bourges, supra. Curtis v. Galvin*, 1 Allen, 215. *Pratt v. Farrar*, 10 Allen, 519. The question to the defendant Roberts as to whether she had agreed to let the house to another person when the plaintiff moved out also was rightly excluded as immaterial. The question to the defendant McAllister as to whether he had testified in the action for rent brought by him against this plaintiff in 1916, that the lease was a "cover" lease and that "we did not want Dr. DeWolfe to know" was properly excluded; it had no tendency to prove a conspiracy.

The other exceptions to the exclusion of evidence related to damages, — the evidence was inadmissible; besides, as a verdict for the plaintiff would not have been warranted those exceptions have become immaterial.

Exceptions overruled.

HAVERHILL STRAND THEATRE, INCORPORATED, vs. A. L. GILLEN
& others.

Suffolk. January 18, 1917. — February 28, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE &
CARROLL, JJ.

Unlawful Interference. Labor Union. Equity Jurisdiction. To enjoin unlawful interference.

In a suit in equity against the members of an unincorporated labor union to enjoin the defendants from interfering with the plaintiff carrying on his business in his own way, if the plaintiff shows that the combination of the defendants was for an illegal purpose declared in a rule, he is entitled to relief on showing

that the defendants intend to enforce their declared purpose, and it is not necessary for him to go further and prove that the defendants threaten to enforce the purpose expressed in their rule by means which are illegal.

The proprietor of a moving picture theatre, who wishes to employ a single musician to play the organ at all performances given there, can maintain a suit in equity against the members of a labor union of musicians to enjoin the defendants from enforcing against him a minimum rule adopted by the union, by which the plaintiff in order to employ any member of the union is required to employ an orchestra of not less than five musicians.

A combination of the musicians in a city, by which a proprietor of a place of entertainment in the city in order to employ any member of the combination is compelled to employ a specified number of other members, is illegal as an unjustifiable interference with the right to such free flow of labor as every member of a community is entitled to for the purpose of carrying on the business which he has chosen to undertake.

Pickett v. Walsh, 192 Mass. 572, distinguished.

Scott-Stafford Opera House Co. v. Minneapolis Musicians Association, 118 Minn. 410, disapproved.

BILL IN EQUITY, filed in the Superior Court on September 9, 1916, by a corporation engaged in the operation of a moving picture theatre in Haverhill against certain officers and members of a voluntary unincorporated association, called Local 302, American Federation of Musicians, and all other members of that local association too numerous to be named individually, to enjoin the defendants from enforcing a rule adopted by such local association, by which all members of the association were forbidden to perform in the plaintiff's theatre unless the plaintiff should employ not less than five musicians for the purpose of furnishing musical accompaniments at its entertainments.

The case was referred to a master, who filed a report. The material facts found by him are stated and described in the opinion. The special findings which are referred to in the opinion as being set forth in full in the statement of the case were as follows:

"2. This rule is enforced against the members of the union by either fine or expulsion."

"4. There has been neither a boycott nor strike put in force or threatened to be put in force by the defendants or any of them against the plaintiff.

"5. The defendants or any of them have in no wise disturbed or interfered with any existing contractual relation to which the plaintiff is a party.

"6. The defendants or any of them have in no wise threatened the plaintiff or its business."

"8. Coburn, the organist, refrained from working in the plaintiff's employ after September 10, 1916, because of the existence of said rule and the penalties incident to its violation."

The case came on to be heard by *Lawton, J.*, who by agreement of the parties made an interlocutory decree confirming the master's report and at the request of the parties reserved and reported the case upon the pleadings and the master's report for determination by this court, such final decree to be entered as might be just and proper.

The case was argued at the bar in January, 1917, before *Rugg, C. J., Loring, Braley, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices.

J. J. Kaplan, for the plaintiff.

H. J. Cole, for the defendants.

LORING, J. The plaintiff corporation is a "moving picture and vaudeville house" in Haverhill. The defendants are officers and members of a labor union of musicians. They also are joined as representing the other members of it who are too numerous to be made parties defendant. For convenience we shall speak of the union as the party defendant. In the summer of 1916 the plaintiff had in its employ an organist, one Coburn by name, who was a member of the defendant union. He played an organ (part of the plaintiff's building) at all performances given by it, and the music of the organ was the only music furnished at these performances. Before 1916 the defendant had adopted a minimum rule fixing the number of musicians who should be employed in the different theatres in Haverhill. By this rule the plaintiff was required to employ an orchestra of five musicians if it wished to employ any member of the defendant union. The minimum rule had been suspended during the summer of 1916. At some time shortly before the filing of this bill the defendant notified the plaintiff that it was about to enforce the minimum rule so far as the plaintiff was concerned. "From motives of economy" the plaintiff wished to continue to employ Coburn and Coburn alone. Upon being informed of the defendant's intention to enforce the rule, the plaintiff brought this bill on September 9, alleging that the rule was illegal and asking that the defendant be enjoined

from putting it in force. After playing at the performance on September 10, Coburn left the plaintiff's employ "because of the existence of said rule and penalties incident to its violation" to quote the terms of one of the findings made by the master. It would seem that Coburn's wages were \$27 a week with one night off. Some time after Coburn left, the plaintiff succeeded in hiring a non-union organist, and it had to pay him \$60 a week. The master's report ends in these words: "Upon the pleadings and the foregoing findings, general and special, the parties agree, without waiving their right to raise other questions, that the following question of law may be posited for the court. In the absence of boycott, strike, intimidation or interference with existing contractual relations, does an unincorporated labor organization have a legal right to enact with penalty of fine or expulsion a rule which prevents its members for [from] working for any employer, unless said employer employs a given number of union men; and where, as a matter of fact, the operation of said rule narrows the labor market and restricts the field of competitive employment for the employer?"

The first contention of the defendant is that on the findings of the master the "plaintiff had acquiesced in the enforcement of the rule" here complained of and that a decree dismissing the bill on that ground "would be well warranted on this evidence." After making this suggestion the counsel for the defendant seems to have waived it. But, if the suggestion is not to be taken to have been waived, it is enough to say that on the findings of the master what was said by the plaintiff to the defendant was not sufficiently definite to amount to an agreement not to maintain this bill if it was entitled to do so.

The defendant's next contention is based upon the master's finding that "neither a boycott nor strike [had been] put in force or threatened to be put in force" by the defendant before the bill now before us was brought; that the defendant had "in no wise disturbed or interfered with any existing contractual relation to which the plaintiff is a party" and that the defendant "in no wise threatened the plaintiff or its business" before the bringing of the bill. The three special findings here relied on together with the finding already referred to and one other finding are set forth in full in the statement of the case.

The defendant's contention based upon these findings is that in the absence of a strike or of threats on the part of the defendant the present bill cannot be maintained. It is this contention without doubt which is referred to in the opening words of the question of law which the master says that the parties agreed should be "posited for the court." This contention is without foundation. On the findings made by him it must be taken that the master has found that the defendant did notify the plaintiff that it would enforce its minimum rule but that the defendant made no threats to the plaintiff other than the notice that the rule would be enforced.

The bill was brought, (first) on the ground that the rule was an illegal one and (second) on the ground that the defendants had notified the plaintiff that they would enforce it. For the purpose of the question under discussion, it must be assumed that the rule was an illegal one. If a union notifies a plaintiff that they will enforce an illegal rule which operates to his prejudice he has a right to bring a bill to have the union enjoined from enforcing it. In the case at bar the master finds that the defendant union did notify the plaintiff that it would enforce the minimum rule and the plaintiff proved the fact that the defendant did intend to enforce it when it proved that Coburn left "because of the existence of said rule and penalties incident to its violation." The contention that a plaintiff cannot bring a bill upon being notified that a combination of individuals will enforce an illegal rule which operates to his prejudice in the absence of a strike or threats of a strike or intimidation is founded on a misconception. Where a combination is a legal one a plaintiff has a right to complain if the parties to the combination undertake to enforce it by illegal means. A boycott and threats of intimidation by using physical violence are illegal means of enforcing a legal combination. But a strike is one of the legal means to which parties have a right to resort to enforce a legal combination. On the other hand when a combination is an illegal one the plaintiff has a right to have it enjoined in case it operates to his prejudice on proving the fact that the defendants intend to enforce it. He has no need to go further and prove that the defendants have threatened to enforce it by means which are illegal.

With this explanation the question propounded to the court by

the agreement of parties is this: Is a combination between musicians a legal one by which a plaintiff is compelled to employ a number of musicians specified by the members of the combination if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his (the plaintiff's) business and that the employment of more than one musician will cause him pecuniary loss. It is manifest that such a rule is an interference with a plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on the business in which he or it has chosen to embark. The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand it is illegal if that purpose does not justify the interference (which ensues from the making and enforcing of the combination in question) with the plaintiff's right to a free flow of labor. So much is settled in this Commonwealth. See, for example, *Plant v. Woods*, 176 Mass. 492; *Reynolds v. Davis*, 198 Mass. 294; *DeMinico v. Craig*, 207 Mass. 593, 598; *Minasian v. Osborne*, 210 Mass. 250; *Burnham v. Dowd*, 217 Mass. 351; *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554. It is also settled in this Commonwealth that the question, whether the purpose for which the combination is made does or does not justify interference with the plaintiff's right to a free flow of labor, is a question of law for the court. *DeMinico v. Craig*, *ubi supra*. *Minasian v. Osborne*, *ubi supra*. *Cornellier v. Haverhill Shoe Manufacturers' Association*, *ubi supra*.

There is no decided case in this Commonwealth which has gone so far as we are asked to go in the case at bar and with the exception of the case of *Scott-Stafford Opera House Co. v. Minneapolis Musicians Association*, 118 Minn. 410 (which is not law in this jurisdiction as we shall point out later on), there is no decided case outside of this Commonwealth which has gone so far.

No case has gone further toward supporting the defendant's

contention than *Pickett v. Walsh*, 192 Mass. 572. But that case does not go as far as we are asked to go here.

The question we have to decide in the case at bar is whether the doctrine of *Pickett v. Walsh* is to be extended. In *Pickett v. Walsh* a union of masons struck, that is to say, combined to refuse to lay bricks to get the work of pointing the mortar after the bricks had been laid. The contractor wished to give the work of pointing to men known as pointers who had that and that alone as their trade. In that case the complaint was made by the pointers. But that is not material. It was held that the purpose for which the combination was made, namely to get work for members of the union, was a justification for the interference with the pointers' right to be employed to do the work and as a consequence that the combination was a legal one. But in that case the contractor wanted the pointing done. The peculiarity of the case at bar is that the work which the defendants have combined to force the plaintiff to give to them is work which the plaintiff does not want done; not only that but it is work which if done at the plaintiff's expense will cause him pecuniary loss. The difference between *Pickett v. Walsh* and the case at bar is that in *Pickett v. Walsh* the defendants combined for the purpose of getting work which the employer wanted done while in the case at bar the purpose of the defendants' combination is to force the plaintiff to make work for them when he does not wish to have that work done and when that work will result in a pecuniary loss to him. The question is whether a combination by a union for the purpose of getting work for the members of it in this indirect way is a justifiable interference with the plaintiff's right to a free flow of labor.

The consequences of holding a combination for such a purpose to be a legal one are far reaching. If it is legal for a union of musicians to combine for the purpose of forcing a plaintiff (who wants an organist only) to employ an orchestra of several pieces, that is to say, if that indirect purpose of enabling the union musicians to earn more money justifies the adoption of the minimum rule, it is hard to see why it is not legal for a union of carpenters (for example) to refuse to work on a building belonging to the plaintiff unless he uses in the construction of it hand-made doors, window frames and window sashes, in place of doors, window frames and window sashes made by machine. Heretofore it

seems to have been assumed that a rule forbidding union members to work on machine-made material in order to get the work of doing it by hand was not a legal combination. See in this connection *Oxley Stave Co. v. Coopers' International-Union of North America*, 72 Fed. Rep. 695; *Hopkins v. Oxley Stave Co.* 83 Fed. Rep. 912; *Minasian v. Osborne*, 210 Mass. 250, 253. There is more money for masons, carpenters and plumbers in building a ten-story store than there is in building a store of two stories. If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all the theatres within its jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters and plumbers fixing the number of stories of which every store to be erected in the business district is to consist. That is to say, masons, carpenters and plumbers may combine to refuse to work on any store less than ten stories in height even though the owner of the land wishes to erect a store of two stories only and even though the owner in his judgment cannot without pecuniary loss erect one having more than two stories. It is no answer to point out that the right of an owner of land to erect a two-story building upon it is an absolute one and what we are concerned with in the case at bar is the plaintiff's limited right to a free flow of labor. But, in the case of a minimum rule adopted by a union or combination of unions fixing the number of stories for every store erected in the business district, the absolute right of the owner to erect a store having fewer stories is not interfered with. The minimum rule does not forbid the owner erecting such a store with his own hands or by employing non-union labor. What such a minimum rule interferes with is not the owner's right to erect the store with fewer stories but the owner's right to a free flow of labor to erect a store with fewer stories. If such a minimum rule can be legally adopted by a union or a combination of unions it is hard to see why unions or a combination of unions cannot adopt a minimum rule fixing the number of stories in case of any and every building to be erected upon any and every foot of land within the Commonwealth. Other illustrations might be put showing the far reaching consequences of a decision upholding the legality of this minimum rule.

A majority of the court are of opinion that a minimum rule

fixing the number of musicians to be employed in the several theatres specified in it is an interference with the right of the owners of those theatres to a free flow of labor which is not justified by the purpose for which it is made.

The defendants have relied upon *Scott-Stafford Opera House Co. v. Minneapolis Musicians Association*, 118 Minn. 410, where the court reached a conclusion contrary to that reached by us. But that case was decided upon the ground that what one man may do singly any number of men may agree to do jointly. That is not the law of this Commonwealth. *Burnham v. Dowd*, 217 Mass. 351. *Pickett v. Walsh*, 192 Mass. 572, and cases there collected.

From what has been said it follows that the combination complained of by the plaintiff is an illegal combination and that injunction should issue as prayed for.

So ordered.

NETTIE E. HARRINGTON vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 8, 9, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Elevated railway. *Elevated Railway*. *Evidence*, Competency, Opinion: experts. *Practice*, *Civil*, Conduct of trial, Exceptions, New trial. *Witness*. *Constitutional Law*.

In an action against a corporation operating an elevated railway for personal injuries sustained by stepping into an open space between a temporary station platform of the defendant and the step of a car forming part of a train of the defendant that was on tracks placed in a temporary location while extensive changes were being made in the arrangement of the station, where it appears that the design of the platform, the space between it and the cars and the relation of the rails to the platform were not permanent and were established by the defendant in accordance with its own plans, which were not approved by any public board, it is a question of fact on proper evidence, whether it was reasonable for the defendant, in the performance of the duty owed by it to its passengers, to provide guards or to give warning to persons about to enter the cars from the platform of the width of the space that they would have to step over.

In an action of tort for personal injuries alleged to have been sustained by reason of the defendant's negligence, all the circumstances under which the injuries

- were received ordinarily may be put in evidence and a considerable degree of discretion is vested in the presiding judge at the trial as to admitting evidence to show the incidents immediately preceding and attendant upon the accident.
- In the case above described the admission by the presiding judge of a question addressed to the plaintiff as a witness, whether as she was about to enter the car she was "in a position where" she "would have heard if anything had been said in regard to the space," was *held* not to be reversible error, this being treated as an abbreviated question calling for a statement of the facts as to the precise position of the plaintiff with reference to the brakeman.
- In the same case it was *held* that the plaintiff properly was allowed to show by the defendant's engineer that the temporary location of the defendant's platform and tracks at that station, as they were for a period of about eight weeks including the time of the plaintiff's injuries, was not approved by the railroad commission.
- In the same case it was *held* that an expert engineer properly was permitted to testify that in his opinion the temporary platform in use at the time of the plaintiff's injuries was not a reasonably proper structure, this being a matter of engineering skill applied to complicated conditions and outside the range of common knowledge.
- In the same case an expert engineer, called as a witness by the plaintiff, after having testified and having been cross-examined at length on matters within his special department of knowledge, was permitted on his redirect examination to testify that he had been employed by the defendant as an expert in engineering, and it was *held*, that, although it would have been a wiser exercise of discretion by the presiding judge to have excluded this question, it being the better practice not to receive such evidence, yet the evidence was not strictly incompetent and its admission was not reversible error.
- In the same case a witness called by the defendant was at the time of the accident a motorman in the defendant's employ, and was asked, whether the defendant ran any trains of five cars between eleven and twelve o'clock at night. The presiding judge excluded the question. *Held*, that the exclusion of the question was not reversible error, as it did not appear, and the defendant had made no offer to prove, that the witness's knowledge of the train operations of the defendant was so comprehensive as to make his testimony on that subject of any value.
- In the same case a question was raised whether the defendant ought not to have installed a sliding platform to bridge the space into which the plaintiff fell, and the defendant introduced testimony to the effect that its expert did not know of any place where sliding platforms were used for a ten inch space or for any space less than fifteen or sixteen inches. After this, the plaintiff was permitted to introduce evidence that at another station of the defendant a sliding platform to bridge a space of eleven inches had been used several years after the accident. *Held*, that this evidence could not be said to be wholly incompetent, as it bore upon the weight to be given to the testimony of witnesses called by the defendant.
- In the same case it was *held* that the presiding judge was right in refusing to make certain rulings which might have been applicable to an accident that happened in a subway, the station at which the plaintiff's injuries were received having been a temporary elevated one.
- In the same case it also was *held* that the presiding judge was right in refusing to

make certain rulings which assumed the existence of facts that were not established indisputably.

In the same case it also was *held* that the presiding judge was right in refusing to make rulings that, whether correct or not, related to details and fragments of evidence concerning which the judge could not be required to make rulings or give instructions.

It is wrong for a judge who has presided at a trial to indorse upon a bill of exceptions presented to him for allowance, that a certain statement contained in it is without foundation in fact but that he will "allow it as a statement of fact to prevent the delay which would be caused by sending this case to a commissioner." Under R. L. c. 173, § 106, as amended by St. 1911, c. 212, § 1, a judge can allow exceptions only after making a preliminary finding that they "are conformable to the truth" and, if they are not conformable to the truth, he has no authority to allow them.

Where the judge who had presided at a trial indorsed upon a bill of exceptions the certificate quoted above, it was *held* that the excepting party was right in thereafter presenting to this court a petition to establish the truth of his exceptions.

At the trial of an action of tort against a corporation operating an elevated railway, for personal injuries caused by the alleged negligence of the servants of the defendant, the presiding judge during the trial "called the defendant's counsel to the bench, and, not in the hearing of the plaintiff's counsel and not in the hearing of the jury, but while the jury were in their seats, told the defendant's counsel that he ought to settle the case, that he ought to be willing to pay anywhere from \$3,750 to \$5,000 to settle the case, adding that that did not mean that the court would set aside a verdict for twice that amount." This was shown in support of a motion for a new trial, it being contended that this conduct of the judge was a violation of the defendant's rights under art. 29 of the Declaration of Rights, which provides that, "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." *Held*, that, although the judge well might have refrained from voluntarily naming an amount that he thought properly could be paid by the defendant in settlement of the plaintiff's claim, in the absence of any invitation from the parties to do this, yet the suggestion of a compromise was in no way inconsistent with the proper performance of his duties, and that the remarks of the judge quoted above, fairly construed, did not mean that the case had been prejudged by him.

In the same case it was *held* that there was no ground for taking the case out of the general rule that the granting or denial of a motion for a new trial rests in the fair discretion of the trial judge.

It also was *said* that it is only where there is an abuse of sound judicial discretion or an excess of jurisdiction or some similar error of law that this court can revise the exercise of this discretion by the trial judge.

In the same case it was *pointed out* that the defendant did not take an exception at the trial to the remarks of the judge which it made the basis of its motion for a new trial, nor did it move that the trial be suspended or that the jury be discharged by reason of the remarks, but took its chance of obtaining a verdict.

In the same case it was contended by the defendant that the record taken as a whole showed such an element of prejudice against it on the part of the presiding judge that a trial fair to it could not have been had, and it was *said*, that,

assuming that such a contention was open to the defendant without its having taken any exception on that ground, a careful examination of the entire record failed to reveal such conduct on the part of the judge as would constitute reversible error or convince this court that the defendant did not receive fair treatment at the trial.

TORT against the Boston Elevated Railway Company for personal injuries sustained shortly before midnight on Saturday, November 7, 1908, from falling between a temporary station platform at an elevated station of the defendant at the North Station in Boston and the step of a car forming part of a train of the defendant which the plaintiff was attempting to enter as a passenger. Writ dated January 14, 1910.

In the Superior Court the case first was tried before *Pratt, J.*, who ordered a verdict for the defendant. The plaintiff alleged exceptions, which after the death of *Pratt, J.*, were allowed by *Wait, J.*, and were sustained by this court in a decision reported in 221 Mass. 299.

The case was tried again before *White, J.* The conduct of the trial so far as material to the exceptions is described in the opinion. At the close of the evidence the defendant asked for certain rulings among which were the following:

"4. The fact that the defendant had not installed a movable platform at the place where the accident happened is not evidence of negligence.

"5. It was not negligence for the guard to call out 'wide step.'

"6. It was not negligence for the guard to fail to call out 'wide step.'

"7. No duty rested upon the defendant to give the plaintiff notice of the space between the car and the platform.

"8. If the space into which the plaintiff stepped was only ten inches or less in width, then the plaintiff cannot recover.

"9. If the plaintiff met with her accident at the rear door of the first car after it had stopped at its regular stopping place, then she cannot recover."

The judge refused to make any of these rulings and submitted the case to the jury with instructions which in part are described in the opinion.

The defendant excepted "to so much of the charge as related to

what had been done other nights, as to whether there should have been a more efficient notification."

The *ad damnum* named in the writ was \$2,000. Previous to the trial the plaintiff had filed a motion, which was argued at the motion session, to raise the *ad damnum* to \$10,000. The judge who heard the motion made an order leaving the motion to be passed on by the court at the time of the trial of the case. At the trial, after the jury had retired, the judge allowed the motion to raise the *ad damnum* to \$10,000. Thereupon the counsel for the plaintiff said, "I was going, your honor, to file a motion to raise the *ad damnum* to \$15,000." The judge said, "Well, where is it?" The counsel said, "I was going to draw it." The judge said, "Well, why don't you go ahead and do it?" The counsel then drew a motion to raise the *ad damnum* to \$15,000. The defendant objected to its allowance. The judge said that he would pass on the motion after the jury had returned their verdict. On the same day the jury returned a verdict for the plaintiff in the sum of \$10,000, and thereupon the judge allowed the motion to raise the *ad damnum* to \$15,000, subject to the defendant's exception.

The defendant alleged exceptions, which were allowed by the judge.

The defendant also filed a motion for a new trial. The motion was denied by the judge, and the defendant filed a bill of exceptions, upon which the judge made the certificate in regard to their allowance that is quoted in the opinion. The defendant then filed a petition for the establishment of the truth of its exceptions, which was referred to a commissioner. The report of the commissioner was presented to this court, who allowed the exceptions as stated in the opinion and proceeded to consider them.

J. T. Hughes, for the defendant.

J. W. Allen & H. W. Packer, for the plaintiff.

RUGG, C. J. This is an action of tort to recover damages for personal injuries received by the plaintiff while attempting to board a car upon an elevated train of the defendant at the North Station in Boston shortly before midnight, at a time when extensive changes were under way rendered necessary by the construction of the Washington Street tunnel. The location of the tracks and the platform were temporary and the plaintiff received injuries

by stepping into a space between the station platform and the car. It was held when the case was here before as reported in 221 Mass. 299, that the plaintiff was entitled to go to the jury. The main facts there are narrated and need not be repeated. Different questions of law are presented now.

1. The plaintiff was permitted, subject to the exception of the defendant, to show that there were several persons in uniform and apparently employees of the defendant standing in a group outside the door from the station to the platform, that after passing them she saw no other employee or person in uniform on the platform and that a brakeman or guard standing between two cars near where she went into the hole said nothing to her in the way of warning. In this there was no error. The design of the platform, the space between it and the cars and the relation of the rails to the platform were not permanent and were established by the defendant in accordance with its own plans. These plans were not approved by any public board. They were not inflexible nor imperatively required in that precise form by the scheme adopted by the public authorities and imposed on the defendant. There was considerable latitude of choice to the defendant in the determination of these details. The relation of tracks to platform, as it had been before the construction of the changes had begun, was more nearly straight and there was less space for the passenger to step over in going from the platform to the car. This was the first time the plaintiff had been at this station since the changes had been in progress. Whether under these transient conditions it was reasonable for the defendant, in the performance of the duty owed by it to its passengers, to provide guards or to give warning, were questions of fact for the jury. *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 508, 510. *Brisbin v. Boston Elevated Railway*, 207 Mass. 553.

The case is quite different from those of which *Falkins v. Boston Elevated Railway*, 188 Mass. 153, *Willworth v. Boston Elevated Railway*, 188 Mass. 220, *Hawes v. Boston Elevated Railway*, 192 Mass. 324, and *Seale v. Boston Elevated Railway*, 214 Mass. 59, are examples, where it has been held that, the platform being constructed by the transit commission, the defendant is not responsible for space between it and the cars even though the stop may be made opposite a curve, and that there is no obligation resting upon

the defendant, in the absence of disorder, to give warning of the space to persons about to enter or alight from cars. The extent of the space between the car and the platform is not the sole test. Where the structures are permanent a much wider space than that here disclosed is of no consequence in view of the conditions laid upon the defendant by the various statutes. *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14. *Anshen v. Boston Elevated Railway*, 205 Mass. 32. See also *Ryan v. Manhattan Railway*, 121 N. Y. 126. But the circumstances of the case at bar are quite different. The relation of the platform to the track was not intended to remain the same for a long time. It was unlike what it had been before. There was evidence that the space between car and platform might have been much reduced. Perhaps it was deeper and hence more dangerous than the spaces commonly disclosed in this class of cases.

For the same reason it was not error to deny the defendant's requests for rulings to the effect that the defendant was not required to give any notice of the space and that, if the space was only ten inches, the plaintiff could not recover. *Harrington v. Boston Elevated Railway*, 221 Mass. 299.

Moreover a considerable discretion was vested in the presiding judge in admitting evidence to show the incidents immediately preceding and attendant upon the accident. Such facts cannot be said to be without bearing upon the due care of the plaintiff, and may have been of assistance in enabling the jury to understand the conditions which confronted her. All the circumstances under which an injury is received ordinarily may be put in evidence.

2. The admission of the question, whether the plaintiff as she was about to enter the car was "in a position where" she "would have heard if anything had been said in regard to the space," was not reversible error. The pertinent inquiry in that connection was her precise position with reference to the brakeman. Where she stood and what was her posture, like facts respecting him, and the distance between the two, were material. While it would have been better practice, because less liable to run into an incompetent field, to have developed these basic facts by appropriate interrogatories, an abbreviated question including all these circumstances, subject as it was to cross-examination, does not appear to have been injurious to the defendant. See *Slattery*

v. *New York, New Haven, & Hartford Railroad*, 203 Mass. 453, 457. It is distinguishable from the question, whether she would have been likely to hear if anything had been said, held incompetent because a mere matter of opinion in *Commonwealth v. Cooley*, 6 Gray, 350.

3. There was no reversible error in permitting the plaintiff to show by examination of the defendant's engineer that plan 3, which delineated the temporary location of platform and tracks as they were for a period of about eight weeks including the time of the plaintiff's accident, was not approved by the railroad commission. It was pertinent as indicating that the defendant was not entitled respecting these structures to the protection against liability established by the decisions as to permanent structures, such as *Collins v. Boston Elevated Railway*, 217 Mass. 420, where earlier cases are collected. Since the presiding judge ruled that there was no duty resting on the defendant to have the plan approved and hence no negligence in not securing such approval, it is not necessary to consider whether St. 1897, c. 500, § 6, requiring approval in certain instances, applies to this kind of construction.

4. An expert engineer was permitted to testify that in his opinion the temporary platform in use at the time of the plaintiff's accident was not a reasonably proper construction. This was not a mere opinion about common things of ordinary construction, as to which the simplicity of common sense is a safer guide than the niceties of technical learning. *Whalen v. Rosnosky*, 195 Mass. 545. *Gleason v. Smith*, 172 Mass. 50. *Walker v. Williamson*, 205 Mass. 514. *Lynch v. C. J. Larivee Lumber Co.* 223 Mass. 335, 340. *Amstein v. Gardner*, 134 Mass. 4, 9. *Spokane & Inland Empire Railroad v. United States*, 241 U. S. 344, 351. It involved, as a necessary element of an intelligent answer, engineering skill directed to complicated conditions under which the platform, the curves, grades and alignment of tracks for the temporary uses must be constructed and maintained. His answer means that under these conditions an arrangement of structures might have been designed and built offering less hazard to the traveller than those adopted by the defendant. Manifestly this was outside the range of common knowledge. It was not an inference from proven facts as to which men of ordinary expe-

rience would not be left in doubt. *New England Glass Co. v. Lovell*, 7 Cush. 319, 321. *Lang v. Terry*, 163 Mass. 138, 143. *Bourbonnais v. West Boylston Manuf. Co.* 184 Mass. 250, 254. *Roberts v. Vroom*, 212 Mass. 168.

5. A witness called as an expert engineer, having given evidence at length respecting matters within his special department of knowledge, on redirect examination was permitted to testify that he had been employed by the defendant as an expert in engineering. It is not an uncommon practice to examine a witness, offered as an expert, respecting his experience and the various persons who have availed themselves of his superior knowledge. Much must be left to the discretion of the presiding judge. The question and answer here complained of cannot be said as matter of strict law of evidence to have been incompetent. It would have been a much better exercise of judicial discretion to have excluded the evidence. It is difficult to conceive of a case where it would not be wiser discretion in the presiding judge to exclude such an inquiry altogether whenever put. Ordinarily it is preferable practice for manifest reasons not to receive such evidence. But, even where testimony has been regarded as "very objectionable" in this particular, its admission is not treated as reversible error if there is any justification whatever for the conduct of the presiding judge. *Conness v. Commonwealth*, 184 Mass. 541, 544. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 385. *Fourth National Bank of Boston v. Commonwealth*, 212 Mass. 66, 69. The present inquiry falls within that principle.

6. A witness, called by the defendant and at the time of the accident a motorman in its employ, was asked whether the defendant ran any trains of five cars between eleven and twelve o'clock at night. The exclusion of this question is not reversible error. It does not appear that his knowledge of the train operations of the defendant was so comprehensive as to make his testimony of any value. Moreover, no offer of proof was made. *Cook v. Enterprise Transportation Co.* 197 Mass. 7, 10.

7. One question raised at the trial was whether the defendant ought, in the exercise of due care, to have installed a sliding platform in order to bridge the space between the immovable platform and the car door at which the plaintiff testified she was injured. There was also testimony that the distance between the

platform and the car door was the basis for the use by the defendant of movable platforms, that they were not regarded as desirable and were put in only where the space was so great as to overcome by added convenience objections to their use. As bearing upon this point, the defendant had introduced testimony to the effect that its expert did not know of any place where sliding platforms were used for a ten inch space or for any space less than fifteen or sixteen inches. Evidence that at another station of the defendant a sliding platform to bridge a space of eleven inches had been in use several years after the accident, cannot be said to have been entirely incompetent in this posture of the case. It bore upon the weight to be given to the witnesses called by the defendant. It is quite distinguishable from evidence of precautions taken by a defendant after an accident, which plainly is inadmissible.

8. There was no error in the refusal to give the several requests presented by the defendant. Whether due care required the defendant to install a movable platform at the place of injury as a part of its temporary structures, was a question of fact. As has been pointed out, the same rule of liability did not govern the obligation of the defendant as in the subway decision cases. The statement of legal obligation in *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 509, is not relevant to these different facts. There was testimony to the effect that it would have been good engineering to have used such a platform under the conditions here disclosed at the particular place of injury. The criticisms urged by the defendant to this testimony affected its weight rather than its competency. It could not have been ruled as matter of law that it would have been negligence for the defendant's guard to call out or to fail to call out, "wide step." Here again the general principles applicable to the subway and tunnels, *Hogan v. Boston Elevated Railway*, 195 Mass. 313, do not necessarily govern duties of the defendant in the situation at bar.

9. Whether the train consisted of four or five cars was a question of fact on all the evidence. Whether the plaintiff could recover if she attempted to go upon the first car at a regular stopping place was also for the jury upon all the evidence. If it were a train of four cars, the plaintiff contended with some show of support in evidence that the first car might have been found to

have stopped at the place where the first car of a train of five cars would have stopped. Although it was or might have been important for the jury to determine these facts in arriving at a conclusion as to liability, the evidence respecting them was not so indisputable that a ruling of law rightly could be predicated upon the assumption that they were proved one way or the other. The presiding judge fairly and adequately dealt with this matter in his charge.

10. There was no error in the charge respecting the testimony of the witness Farrington to the effect that he stood between the two cars and called out to the passengers to "step wide." If this had been found to be the fact, there could hardly have been negligence on the part of the defendant. But whether he did so call out on the night in question was a point as to which the evidence was conflicting. The reference in the charge to testimony by other witnesses respecting what had occurred on other nights, as compared with the night in question, bore merely upon the weight to be given to Farrington's testimony. It is not open to exception.

11. So far as the subjects to which the requests of the defendant related were necessary parts of the charge, they were adequately covered, and, so far as they were refused, they either were not correct or were directed to details or fragments of evidence concerning which the presiding judge could not be required to give instructions. *Ayers v. Ratshesky*, 213 Mass. 589.

12. The presiding judge early in the trial inquired of counsel whether they had talked as to the settlement of the case, and said that they ought to consider that matter. Later the judge "called the defendant's counsel to the bench, and, not in the hearing of the plaintiff's counsel and not in the hearing of the jury, but while the jury were in their seats, told the defendant's counsel that he ought to settle the case, that he ought to be willing to pay anywhere from \$3,750 to \$5,000 to settle the case, adding that that did not mean that the court would set aside a verdict for twice that amount." This statement was inserted in the defendant's second bill of exceptions relating to matters arising on its motion for a new trial. The judge indorsed upon the exceptions that this statement was without foundation in fact but "I allow it as a statement of fact to prevent the delay which would be caused by sending this case to a commissioner." This was irregular. The

judge in the performance of his duty can allow exceptions only after making a preliminary finding that they "are conformable to the truth." R. L. c. 173, § 106, as amended by St. 1911, c. 212, § 1. If exceptions are not conformable to the truth, the presiding judge has no authority to allow them. He certainly had no power to allow them for any such cause as is stated in the present certificate. Justice can be done only when the truth and nothing but the truth is made the basis of adjudication. This court can not attempt to pass upon the rights of parties upon a record which is in any material particular unfounded in fact. Therefore the petition of the defendant to establish the truth of his exceptions rightly was presented. The report of the commissioner shows that in substance that bill of exceptions is conformable to the truth. It is established. *Moneyweight Scale Co., petitioner*, 225 Mass. 473.

13. "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." Declaration of Rights, art. 29. The conduct of the presiding judge did not violate the justly strict and lofty standard of our Constitution. It is not necessarily a transgression of judicial propriety to suggest to parties in appropriate instances the wisdom of a compromise of conflicting contentions. It is a suggestion which always should be ventured from the bench with caution. There are cases where the right or obligation at stake is not susceptible of concession without the profanation of principles which rightly may be held inviolable by one or more of the parties. Ordinarily a judge may presume in these days that the possibility of compromise has not been ignored by counsel or parties in cases where compromise is feasible or just. In *In re Nevitt*, 54 C. C. A. 622, it appeared that a judge had for several years "endeavored to persuade the parties to the controversy to compromise the litigation." It was said respecting that conduct when urged as a disqualification to a decision of the case on its merits by the same judge, that (page 626) "his earnest and systematic endeavors to effect a compromise of this controversy bespeak for him emphatic commendation. The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims." This laudation goes rather far. But it shows that an intimation as to the practical sagacity of harmonizing adjustable differences is not of itself an impairment of the judicial function.

The judge well might have refrained from voluntarily naming an amount which he thought could be paid by the defendant in settlement of the plaintiff's claim in the absence of any invitation to this end from the parties. Manifestly every judge should be deeply solicitous not only to hold himself wholly impartial between contending litigants, but he should likewise be ever alert and careful to avoid every appearance by word or deed reasonably susceptible of being construed by those in the heat of partizanship as expressions of bias or prejudgment. On the other hand, under our system "the judge who discharges the functions of his office is . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings." His demeanor should not be "hesitatingly barren or ineffective." *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, 502. *Tildsley v. Boston Elevated Railway*, 224 Mass. 117, 119. He ought to know human nature and be familiar with practical affairs. His insight into the merits of the controversies pending before him needs to be clear, sympathetic, accurate. He should be strong, patient, learned, and above all unflinchingly courageous. It is the prevalent impression that it adds to the efficiency of a judge if at the same time his manner is dignified, his conduct tactful and his speech courteous. But however that may be, bluntness is not error of law. The essentials of sound judicial character lie far deeper than superficial deportment. The expression complained of in the case at bar fairly construed does not mean that the cause had been prejudged or that a motion to set aside the verdict, if one should be made, would not be considered according to its just deserts. The remarks made by the judge in denying the motion to set aside the verdict show that that decision was based upon a full consideration of its merits without partiality. See in this connection *Utz & Dunn Co. v. Regulator Co.* 130 C. C. A. 17, 20-22 (213 Fed. Rep. 315); *State v. Bohan*, 19 Kans. 28, 50-53; *In re Cameron*, 126 Tenn. 614, 650, 655, 660; *Elliott v. Hipp*, 134 Ga. 844, 848; *Lafayette v. Milton*, 129 La. 678.

14. It follows from what has been said that there is no error of law disclosed in the proceedings on the motion for a new trial. The general rule prevails that the granting or denial of such motion rests in the sound discretion of the trial judge. *Simmons v.*

Fish, 210 Mass. 563, 572. *Edwards v. Willey*, 218 Mass. 363. That rule applies in the case at bar. It is only when there is an abuse of sound judicial discretion, or excess of jurisdiction, or some similar error of law, that this court can revise the discretion of the trial judge. The several requests for rulings and grounds of exception need not be reviewed one by one. For the reasons stated, no error is disclosed in the refusal of all of them, either as not sound in law or not applicable to the facts.

15. The defendant did not take exception to the remarks of the judge when made, or move that the trial be suspended, or that the jury be discharged. As was said in *Crosby v. Blanchard*, 7 Allen, 385, 387, parties cannot "take their chance for a favorable verdict, reserving a right to impeach it or set it aside, if it happens to be against them, for a cause which was previously well known to their counsel." *Fox v. Hazelton*, 10 Pick. 275. *Gray v. Boston Elevated Railway*, 215 Mass. 143, 150. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456.

16. The defendant has argued that the record taken as a whole shows such an element of prejudice against it on the part of the presiding judge that a trial fair to it could not have been had. The case has been considered on the footing that such contention is open even though no exception was taken. See *Noyes v. Noyes*, 224 Mass. 125, and cases cited at page 134. It is not necessary to narrate the numerous expressions scattered through the record of a long trial upon which reliance is placed. Whatever else may be said respecting them, a careful examination of the entire record fails to reveal such conduct as constitutes reversible error. We are not convinced that the defendant did not receive fair treatment at the trial.

The result is that the petition for the allowance of exceptions is allowed and that each bill of exceptions is overruled.

So ordered.

MICHAEL DERINZA'S (dependent's) CASE.

Suffolk. November 12, 13, 1917. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Alien dependent, Dependency. Deposition. Evidence, Proof of foreign marriage, Judicial notice.

Under St. 1915, c. 275, which provides that in a claim under the workmen's compensation act a commission to take the deposition of a witness in a foreign country may issue from the Superior Court upon the written request of the Industrial Accident Board "or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the Superior Court for any county," an oral application by the Industrial Accident Board and the filing of interrogatories by the secretary of the board are not a written request for a commission within the meaning of the statute.

The words of the statute providing that a commission shall issue "upon the written request of the board or of any member thereof" mean that the application actually must be signed by the board or by some member of the board, and a written request by the secretary of the board cannot be held to be the request required.

It seems that if such a commission to take the deposition of a witness in a foreign country is issued through inadvertence when by mistake or oversight no written request has been filed, the defect can be cured by the filing of a written request by the board or some member of it and the allowance of that request by the Superior Court by a *nunc pro tunc* order.

In a claim under the workmen's compensation act the objection by the insurer to the deposition of the alleged dependent of the deceased employee in a foreign country, that before the commission to take the deposition issued no written request had been filed by the Industrial Accident Board or any member thereof, is an objection to the form of the deposition and cannot be taken for the first time when the deposition is offered in evidence at the hearing before the Industrial Accident Board, after the insurer has filed cross-interrogatories and the deposition has been taken in the foreign country and has been used without objection at the hearing before the arbitration committee.

When a commission has issued for taking the deposition in a foreign country of the alleged dependent widow of a deceased injured employee in a claim under the workmen's compensation act, there is no impropriety in the preparation of interrogatories to be propounded to such widow by the clerk of the Industrial Accident Board "in behalf of" the claimant and acting for an arbitration committee which has been formed to hear the case, the clerk stating that the alleged widow lives in a foreign land and is "without counsel in these proceedings," and there being nothing in the interrogatories propounded to indicate a partizan attitude of mind.

In regard to the same deposition it was *held* that there was nothing in an objection to the admission of the deposition on the ground that it did not appear that the deponent could be punished for perjury in the place where it was taken, the

commission being in the usual form and directed to a consular officer of the United States accredited to a civilized nation.

In regard to the same deposition it was *pointed out* that one of the interrogatories, which was objectionable in form but was answered properly, doubtless would have been expressed in the proper manner if the objection to its form had been made when the interrogatories were filed.

Non-resident aliens, domiciled in the country of a friendly nation, who are dependent for support upon the earnings of a deceased injured employee insured under the provisions of the workmen's compensation act, are entitled to the benefits of the provisions of that act.

R. L. c. 151, § 37, in regard to proof of marriage, does not apply to records of foreign marriages, but *it seems* that, in order that a certificate of a foreign marriage should be received in evidence, there must be proof either of a statute of the foreign State or nation requiring the record to be made or of some legal obligation or established practice requiring the keeping of the record or of some fact respecting the authenticity of the record of the effect of which the court can take judicial notice.

This court does not take judicial notice of the authority of town officials in the Kingdom of Italy in regard to the keeping of records.

In the claim described above, although papers purporting to be copies of certificates of the marriage of the deceased employee and of the births of his children, which were received in evidence by the arbitration committee, were held to have been incompetent, it appeared that the widow of the deceased employee in her deposition testified to the fact of her marriage with the deceased and to the birth of their three children and their ages, and that this testimony was uncontradicted, and it was *held* that this evidence of marriage and birth was competent and that the erroneous admission of the copies of the certificates accordingly was harmless error.

In the claim above described the Industrial Accident Board found that the deceased contributed to the support of his wife during the year before his death a certain number of lire which were equivalent to a certain number of dollars. It was contended by the insurer before this court that the board could not take judicial notice of the value of an Italian lira in United States money and that there was no evidence on the subject, but it appeared that the insurer did not take this objection at the hearing before the Industrial Accident Board or in the Superior Court unless it was raised by the general request for a ruling that no award could be made, and it was *held* that this objection, which if it had been raised at the proper time easily could have been met by the introduction of the required evidence, was not open to the insurer.

In the claim above described, upon the question of dependency, the evidence was that the family of the deceased consisted of his wife and their three children, respectively nine, six and two years of age, who lived in Italy. The widow testified in her deposition that since her husband last left Italy her means of support had been money sent by her husband from the United States, that during the last year before his death she had received over two thousand lire and that before he left Italy they were supported "with the money we earned in working in the fields," and that the deceased had no other property except "the house in which I lived at the time of his death." There was no evidence to show how valuable the house was in which the widow lived, the nature of the deceased employee's title to it, what its rental value was, what was its condition

or state of repair, whether it was encumbered by mortgage or otherwise, or the character of the neighborhood, city or town in which it was. Nothing appeared except that the family lived in the house. The Industrial Accident Board found that the widow was wholly dependent upon the wages of her husband for support. *Held*, that the finding of total dependency was not warranted by the evidence, and that a further hearing should be given before the Industrial Accident Board in which the claimant ought to be allowed to introduce further evidence and the insurer should have the same privilege.

In the same claim the board found as a fact that the three children of the deceased employee also were wholly dependent, and it was *held* that there should be a further hearing on this question also.

In the same case it was *said* that, in a claim of this nature, where there are a widow and minor children wholly or in part dependent, the decree should be of easy comprehension and ought to contain a clause stating expressly that under the terms of the act the payment to the widow is to cease in case of her death before the expiration of the period of payment.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding to Margherita Pucci Derinza, of Savignano di Puglia in the Province of Avellino in the Kingdom of Italy, as the wholly dependent widow of Michael Derinza, the compensation of \$7.20 a week for a period of five hundred weeks from March 29, 1915.

The case was heard by *Hardy, J.* The evidence and the proceedings before the arbitration committee and the Industrial Accident Board so far as they relate to the questions raised on the appeal, are described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The part of St. 1915, c. 275, referred to in the opinion is as follows: "Upon the written request of the [Industrial Accident] board or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the Superior Court for any county of this Commonwealth, commissions to take depositions of persons or witnesses residing without the Commonwealth, or in foreign countries, or letters rogatory to any court in any other of the United States or to any court in any foreign country, shall forthwith issue from the said Superior Court, as in cases pending in said Superior Court, . . ."

R. L. c. 151, § 37, referred to in the opinion as applying only to domestic records, is as follows: "The record of a marriage made and kept as provided by law by the person by whom the marriage

was solemnized, or by the clerk or registrar of a city or town, or a copy of such record duly certified, shall be *prima facie* evidence of such marriage."

N. F. Hesselstine & J. F. Scannell, for the insurer, submitted a brief.

G. Gleason, for the dependent widow.

RUGG, C. J. The deceased admittedly received fatal injuries in the course of and arising out of his employment by a subscriber under the workmen's compensation act.

1. There were irregularities in the application for the deposition to take the evidence of the widow of the deceased. Before the enactment of St. 1915, c. 275, there was no special provision for the taking of depositions in foreign countries in workmen's compensation cases. Letters rogatory could not issue in such cases. *Martinelli, petitioner*, 219 Mass. 58. The entire subject is now covered by that statute. The present deposition purports to have been taken under its terms. Therefore the words of the statute afford the sole guide as to the necessary steps. It expressly provides that a commission to take a deposition shall issue "upon the written request of the board or of any member thereof."

2. There was in the case at bar no "written request" whatever. The filing certificate of the clerk of the Superior Court shows that the application was made by the Industrial Accident Board, but not that it was made in writing. The filing of the interrogatories by the secretary of the board was not a written request for a commission, but was an utterly different matter. Interrogatories are expressly required by the statute, and are the essential basis for the taking of a deposition. That is one thing. The written request for a commission is another and quite separate thing. It cannot rightly be said that the writing out of the interrogatories by the secretary of the board was a written request for the issuing of a commission to a consul of the United States in Italy to take a deposition.

3. The making of a written request for a deposition by the Industrial Accident Board hardly can be said to be a merely formal requirement. It is to be made by a public board acting impartially and not as an adversary party. The written request is a matter of substance. It frequently might be open to inference, as it is in the case at bar, in view of the certificate of the clerk of the

Superior Court, that the commission was issued at the request of the board, and that the omission of the board to make the written request was by mistake or oversight. If so, it could be cured by the filing of a written request by the board or some member of it, and the allowance of that request by the Superior Court by a *nunc pro tunc* order. *Perkins v. Perkins*, 225 Mass. 392, 396, 397.

4. The case has been argued as if the request for the commission to take the deposition had been made by the secretary of the board in its behalf. The secretary of the board cannot make such request. The board is empowered by Part III, § 2, of the act (St. 1911, c. 751) as amended to "appoint a secretary" and to "remove him." No provision fixing his duties has come to our attention. The phrase of the statute is that the commission to take a deposition shall issue "upon the written request of the board or of any member thereof." These words fairly interpreted mean that the application must be actually signed by the board or by some member of the board. The statutory words impose a personal responsibility in making the application to be manifested by the signatures of the board or some member of it. They do not mean that the application is a purely clerical matter which may be delegated to an agent, officer or employee. A written request by the secretary of the board cannot be held to be the equivalent of a "written request of the board or of any member thereof." See R. L. c. 8, § 5, cl. 25; *Finnegan v. Lucy*, 157 Mass. 439.

5. It does not follow, however, that the deposition must be rejected. No objection was made to the form of the deposition until it was offered in evidence before the arbitration committee. The insurer filed interrogatories and hence must have known or had the opportunity for observing this irregularity at its inception. It has been held that objections to irregularities in the form of a deposition must be taken in some appropriate manner by notice, motion to suppress, or otherwise, before the trial opens, or they will be held to be waived. It is only objections to the substance of the interrogatories or answers that avail when presented for the first time at the trial. *Atlantic Mutual Fire Ins. Co. v. Fitzpatrick*, 2 Gray, 279. *Palmer v. Crook*, 7 Gray, 418. *Howard v. Stillwell & Bierce Manuf. Co.* 139 U. S. 199, 205. *Bibb v. Allen*, 149 U. S. 481, 489. •

6. It appears from the report of the arbitration committee that direct interrogatories were drafted and signed by the secretary of the board "in behalf of" the claimant, and that "he was acting for a committee on arbitration which had been formed to hear the case." The further fact is stated that "the alleged widow lives in a foreign land. She is without counsel in these proceedings." It does not appear that the insurer knew of the fact that the interrogatories were thus framed until advised of it by the report of the arbitration committee. Its objection to the deposition on this ground is treated as open to it. There is no necessary incompatibility between the duty imposed upon the arbitration committee of passing upon the rights of the dependents and the insurer, and the preparation of interrogatories to the widow of a deceased employee by the secretary of the board at the request of such committee under the circumstances here disclosed. An examination of the interrogatories does not disclose such a partial attitude of mind as to warrant the inference that the arbitration committee, assuming that they directed the line of inquiry or the particular phrase of the questions, disqualified themselves from performing the duty imposed on them by the statute.

7. There is nothing in the objection to the admission of the deposition on the ground that it did not appear that the deponent could be punished for perjury in the place where it was taken. The commission was in usual form directed to a consular officer of the United States accredited to a civilized nation. The return was in due form. This was enough to make the deposition admissible *prima facie*. L. R. c. 175, §§ 42, 45. There is nothing in *Commonwealth v. Smith*, 11 Allen, 243, to the contrary.

8. There is no reversible error in the admission in evidence of the answers to the interrogatories, so far as the exceptions to such admission have been argued orally or upon the brief of the insurer. The question as to the intention of the deceased husband when he left Italy to rejoin his wife and children, was objectionable in form; but the answer was responsive. It doubtless would have been remedied if objection had been made when the interrogatories were filed. No other point has been argued in this connection.

9. It is urged that non-resident aliens domiciled in a friendly nation are not entitled to the benefit of the provisions established

by the workmen's compensation act for the compensation of those dependent upon the earnings of a deceased employee. Cases where awards to such aliens have been sustained by this court without the question having been raised are passed by and the case is considered on its merits. The starting point in this Commonwealth is *Mulhall v. Fallon*, 176 Mass. 266. That case held that non-resident aliens were entitled to the penalty awarded to dependents by the employers' liability act against an employer wrongfully causing the death of an employee. The reasons for that decision are there set forth at length. The same reasoning has since led to a similar decision by the Supreme Court of the United States respecting the federal employers' liability act, *McGovern v. Philadelphia & Reading Railway*, 235 U. S. 389, and by the Court of King's Bench in England respecting the English employers' liability act. *Davidsson v. Hill*, [1901] 2 K. B. 606. To the same effect are *Cetofonte v. Camden Coke Co.* 49 Vroom, 662, and cases collected at page 669, *Atchison, Topeka & Santa Fe Railway v. Fajardo*, 74 Kans. 314, *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 217. There is no sound distinction in principle between *Mulhall v. Fallon* and the case at bar. The difficulties of investigating the facts as to the dependency of non-resident aliens, the temptation to fraud and the obstacles as to making payments, urged by the insurer against this construction, appear to be no greater in one class of cases than in the other. So far as these circumstances afford opportunities for overreaching, they are legislative rather than judicial questions. There is in the words of our act no exclusion from its benefits of those dependents who are non-resident aliens, as is the case in the statutes of some other jurisdictions. See, for example, *Gregutis v. Waclark Wire Works*, 86 N. J. L. 610. This omission, in view of the investigation of the legislation of other States which preceded the enactment of our statute, is a circumstance to be considered. The theory of the workmen's compensation act is a kind of insurance against accident. The Massachusetts compensation law has been characterized as "an elective compensation insurance law giving compensation for all injuries arising out of employment," with exceptions not now pertinent. Report of the Massachusetts Commission on Compensation for Industrial Accidents, 1912, page 46. Insurance money naturally goes to the beneficiary

regardless of geographical boundaries of residence. The deceased employee, although an alien, if he had lived, manifestly would have been entitled to the benefits of the act. The *quasi*-accident insurance goes by the act to those to whom naturally the deceased would have made real accident insurance payable if he had contracted for it, namely, to those dependent upon his earnings for support. It would be difficult to read into the act by construction an exception adverse to the claims of non-residents who are not alien enemies. This is a quite different question from holding that the act does not by its terms have force as to injuries received beyond the territorial limits of the State, as in *Gould's Case*, 215 Mass. 480. The result is that aliens who are residents of friendly nations and who are dependents and otherwise within the terms of the act, are not barred from compensation solely by reason of alienage. This conclusion is in accord with other decisions upon statutes which do not expressly exclude non-resident aliens from their operation, and are thus in this respect like our act. *Krzus v. Crow's Nest Pass Coal Co. Ltd.* [1912] A. C. 590. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 19-22. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 416.

10. Papers purporting to be copies of certificates of the marriage of the deceased and of the birth of his several children were received in evidence by the arbitration committee. They bore at the heading and at the end the name of an Italian town, and purport to have been authenticated by one who signed his own name followed by the words "civil officer," and there was a seal attached. Plainly these were not admissible under R. L. c. 151, § 37. That section relates to marriages solemnized as provided in that chapter and under the laws of this Commonwealth. That is manifest from the express terms of the first enactment of the substance of this section in Rev. Sts. c. 75, § 25, where it was provided that, "The record of a marriage, made and kept as before prescribed," should be received as evidence. There is no indication of a legislative intent to broaden the scope of the section in making the subsequent enactments. The familiar rule is that verbal changes in the revision of a statute do not alter its meaning and are construed as a continuation of pre-existing law in the absence of some accompanying report of revisers or other indication showing an express purpose to change the substance of the law.

Main v. County of Plymouth, 223 Mass. 66, 69, and cases collected. The discussion in *Shutesbury v. Hadley*, 133 Mass. 242, proceeds on the footing that this section of the statute applied only to domestic records. The only provision in our statutes as to proof of foreign marriages is in § 38 of the same chapter relating to those solemnized in foreign countries by consuls or diplomatic agents of the United States. Manifestly that has no pertinency to the case at bar.

These copies of certificates were not competent evidence. There was no proof of the law of Italy requiring or permitting the keeping of such records by the town, the deposition of the custodian of the records covering material points was not proffered, nor was there any evidence respecting their character, the circumstances under which the records were kept, or the source from which the certificates came. No one testified that they were copies of an official original. There was no authentication of them as genuine by a consular officer of the United States. There was absolutely nothing beyond the bare production of the copies of the certificates. In the absence of a statute making such certificates admissible by themselves, or something to show that they were entitled to a degree of credence, they were not competent. *Commonwealth v. Morris*, 1 Cush. 391. *Kennedy v. Doyle*, 10 Allen, 161, 165. *Hancock v. Catholic Benevolent Legion*, 38 Vroom, 614. *Barber v. International Co. of Mexico*, 73 Conn. 587, 601, 603. *Lavin v. Mutual Aid Society*, 74 Wis. 349. *Faustre v. Commonwealth*, 92 Ky. 34. *Drosdowski v. Order of Chosen Friends*, 114 Mich. 178. *Spencer v. Lyman*, 27 So. Dak. 471. *State v. Dooris*, 40 Conn. 145. *Stanglein v. State*, 17 Ohio St. 453. *Blackburn v. Crawford*, 3 Wall. 175, 187. *People v. Etter*, 81 Mich. 570. *The Earl of Athlone's Claim*, 8 Cl. & Fin. 262. See *Jewett v. Boston Elevated Railway*, 219 Mass. 528, 531.

It is not necessary to decide just what formalities would have been required to render them competent evidence, as the present record is entirely bald of anything in that direction. An examination of all the cases collected in 26 Cyc. 885, note, and relied on by the arbitration committee and the Industrial Accident Board, as to foreign marriages, shows that in none of them was the marriage certificate admitted without either an express statute admitting the certificate, or evidence of some statute of the foreign

State or nation requiring the record to be made, or some evidence showing a legal obligation or established practice to keep the record, or some fact respecting the authenticity of the record of the effect of which the court can take judicial notice. No one of these elements is present in the case at bar. We can have no judicial knowledge respecting records of town officers in Italy.

11. The error in the reception of this evidence does not call for a reversal of the decree. The widow in her deposition testified categorically to the fact of her marriage with the decedent and to the birth of their three children and their ages. Her testimony was competent. *Commonwealth v. Dill*, 156 Mass. 226. It was uncontradicted and there is nothing in the record to throw any shadow upon its truthfulness. It was in other respects believed by the arbitration committee and the Industrial Accident Board. Upon all the circumstances the admission of the copies of the certificates appears to have been harmless error.

12. The finding of the board was that the deceased contributed twenty-four hundred lire or \$480 to the support of his wife during the year before his death. The testimony of the wife upon this point was stated wholly in terms of lire. It is strongly urged by the insurer that the board could not take notice of the value of the lire, an Italian monetary term, in United States money, and that the value and rate of exchange must be proved. The weight of authority seems to support this contention. *Kermott v. Ayer*, 11 Mich. 181. *Lowe v. Bliss*, 24 Ill. 168. *Gross v. Mendel*, 171 App. Div. (N. Y.) 237, 239. See, however, to the contrary, *Czerney v. Hass*, 144 App. Div. (N. Y.) 430, 435. The case of *Johnston v. Hedden*, 2 Johns. Cas. 274, often cited to sustain the view that the court will take judicial knowledge of the value of foreign money, well may be thought not to uphold so broad a proposition. That case was decided in 1801 respecting a bond executed in 1796 in terms of pounds. It is well known that the pound was a unit of value in the colonies before the Revolution. The dollar was established as the money unit of the United States by resolution of the Continental Congress of July 6, 1785, and the details of the decimal monetary system by resolution adopted on August 8, 1786. See, also, resolutions of October 16, 1786, and of April 21 and July 6, 1787. The first act of Congress establishing a mint and providing for a monetary system and general coinage was U. S. St. 1792,

c. 16, approved April 2, 1792. 1 U. S. Sts. at Large, 246. Within the memory of many now living the shilling has been commonly used as a measure of price in this Commonwealth. The statement in the opinion in *Johnston v. Hedden* that "Pounds are not a foreign or unknown money of account," should be read in the light of well known historical facts. The pound and shilling might be found to be measures of value adopted by parties in this country rather than as foreign coin at that early date. But it is not necessary to decide this question because it is not open to the insurer in this record. The insurer asked for no specific ruling directed to this defect in the evidence. If it had, doubtless evidence upon this point easily would have been discovered and presented. The only request which can be construed by any possibility as reaching to this point is the general one that there could be no recovery. That fairly ought not to be interpreted as aimed at this subsidiary and minor point of proof. In order to raise this question the request should have been more definite. In the translations of the copies of the Italian certificates which were received in evidence by the arbitration committee, was basis for a finding that the value of the lire was twenty cents in United States money. That may have been the ground of the finding. If they had been admitted rightly, they could have been used to this end. *Hubbard v. Allyn*, 200 Mass. 166, 171.

13. The administrator of the estate of the deceased concedes that the finding of the Industrial Accident Board, to the effect that the deceased was living with his wife, cannot be supported. *Nelson's Case*, 217 Mass. 467. *Gorski's Case*, 227 Mass. 456. The board found as a fact that the widow was wholly dependent upon the wages of the husband for her support. The evidence upon this point was that the family of the deceased consisted of his wife and their three children, aged respectively about nine, six, and two years. They lived in Italy and apparently never had been in the United States, where the deceased had been at work at several different periods, the last being for more than a year before the injury. The wife testified by deposition that since her husband last left Italy her means of support had been money sent by her husband from the United States, that during the last year before his decease she had received over two thousand lire and that before he left Italy they were supported "with the money we earned

in working in the fields," and that the deceased had no other property except "the house in which I lived at the time of his death." This must mean that he owned the house. The terms of our act award compensation to those dependent upon the "earnings" of the deceased employee, and not to those supported by him, differing thus from the statutes of some other jurisdictions. See, for example, *Crookston Lumber Co. v. District Court*, 131 Minn. 27. Therefore, in the case at bar the finding can be supported only if the wife could be found to have been totally dependent upon the earnings of her deceased husband, and not upon investments of his property. This is so, giving to "earnings" the broadest meaning of which it reasonably is susceptible. *Jenks v. Dyer*, 102 Mass. 235. *Chester v. McDonald*, 185 Mass. 54. The terms of Part II, §§ 7 and 12, the latter to the effect that "no savings or insurance of the injured employee . . . shall be taken into consideration in determining the compensation to be paid" under the act, do not modify and are not in any respect in conflict with the explicit and unequivocal provisions of Part II, § 6, and Part V, § 2, to the effect that dependency in case of the death of an employee shall be ascertained solely with reference to the fact whether the claimants were wholly or partly "dependent upon the earnings of the employee for support at the time of the injury."

There was no evidence to show how valuable the house was in which the widow lived, the nature of the deceased's title to it, what its rental value was, what was its condition or state of repair, whether it was incumbered by mortgage or otherwise, the character of the neighborhood, city or town in which it was, or anything further than the bald fact that the family lived in his house. Nevertheless, it was the house in which the family of the deceased lived. It was their home. Payment of rent, as matter of common knowledge, is a material part of the support of every family whose home is hired. If the housing is provided from some other source than the "earnings" of the employee, it cannot with due regard to the force of words be said that the wife is wholly dependent upon those "earnings." That element of support is a matter of substance. It is not so insignificant as to be negligible, as in *Carter's Case*, 221 Mass. 105, *Buckley's Case*, 218 Mass. 354, and *Caliendo's Case*, 219 Mass. 498. It is too material

to be ignored. *Kenney's Case*, 222 Mass. 401, 404. Manifestly, if the converse of this case were presented, it would inevitably be held that a person otherwise entitled to compensation, who was receiving house rent from the wages of an employee, was to that extent dependent upon his earnings. Findings in favor of dependents have been sustained on much more slender evidence than that would be. *McMahon's Case*, ante, 48. The burden of proving the right to recover under the act rests upon the one asserting it, in this case upon the wife. *Sponatski's Case*, 220 Mass. 526. If the house of the husband was in truth of no value, and the use of it by the family worthless, there must be evidence direct or inferential to that effect. It cannot be presumed in the absence of any evidence on the subject. The finding as matter of fact of total dependency by the wife was not warranted on this record.

The board has found as a fact that the minor children were totally dependent. That finding rests upon the same evidence as the complete dependency of the mother, and therefore, for the reasons already stated, must be set aside as a finding of total dependency. Moreover, it hardly can be supposed that this finding was intended by the board to stand if the finding of total dependency of the wife could not stand. The result of allowing that to stand would be that the payment would go to the children to be held by a guardian for their benefit to the entire exclusion of the widow, because under the last paragraph of § 7 of Part II, in case of persons wholly dependent and others partly dependent, the "persons partly dependent, if any, shall receive no part thereof." It follows that on this point there must be a further hearing by the Industrial Accident Board.

14. The insurer objects to the form of the decree on the ground that it appears to direct the payment to be made to the widow for a full period of five hundred weeks, regardless of the possibility of her death intervening. It was held in *Murphy's Case*, 224 Mass. 592, that a weekly payment to a dependent under the act comes to an end when the dependent dies. See *Bartoni's Case*, 225 Mass. 349, 354. While that would be the effect of the decree entered, it is better in cases of this nature that the decree should state its exact effect in terms not open to misunderstanding by those not learned in the law. It follows that decrees in cases of this nature ought to contain a clause stating in express terms

the effect of the workmen's compensation act, that the payment is to cease upon the decease of the dependent before the expiration of the period of payment.

Since the Industrial Accident Board proceeded in the hearing upon erroneous principles of law, the widow ought to be allowed, if she desires, to introduce further evidence at a new hearing. If she does introduce further evidence, the insurer must have the same privilege and the case be considered anew upon this point. *Doherty's Case*, 222 Mass. 98. The decree must be reversed and the case remanded to the Industrial Accident Board for further hearing on the question of dependency.

So ordered.

CHARLES E. SHATTUCK, administrator *de bonis non* with the will annexed, vs. GEORGE D. BURRAGE, trustee, & others.

Suffolk. November 14, 15, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Power. Executor and Administrator, New assets. Limitations, Statute of, Special: new assets. Words, "New assets."

A power given by will to a beneficiary for life, to dispose by his will of property of the testator, gives the donee of the power no interest at law in the property over which he has the power of testamentary appointment and upon his death such property constitutes no part of his estate; but equity will enforce the equitable duty of such a donee of a power to exercise the power for the purpose of paying his debts before he gives away the property to other persons, and thus the creditors of such a deceased donee of a power acquire immediately upon his death the equitable right to enforce their claims against the property over which he has exercised the power of appointment.

An administrator *de bonis non* with the will annexed of the estate of a testator upon his appointment filed an inventory, in which he included a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will. The administrator *de bonis non* had collected a part of this appointed fund and had included it in his inventory and in the same inventory made reference to the claim to the balance of the appointed property as a claim against the estate of the executor of the will of the donor. A considerable portion of the balance of this fund was collected by the administrator *de bonis non* three years later, and thereupon the creditors of the testator brought a suit in equity under R. L. c. 141, §§ 11, 18, to establish their claim, otherwise barred by the special statute of limitations,

against this fund as "new assets" of the testator's estate. *Held*, that the collection of the portion of the appointed fund by the administrator *de bonis non* and its conversion into cash did not make the money thus collected new assets within the meaning of the statute.

In the case above described the testator in his will made use of the common phrase directing the payment of his just debts, and it was *pointed out* that the use of this ancient and common form could not be regarded as an exercise of the power of appointment by the testator, it being nothing more than an expression of the obligation imposed by law.

In the same case it was *said* that it was unnecessary to determine in that case whether the words "new assets" as used in the statute included such equitable assets as a fund appointed by a debtor testator to persons other than his creditors by the exercise of a power of testamentary appointment.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 12, 1917, by the administrator *de bonis non* with the will annexed of the estate of Charles Howard Richardson, late of Chicago in the State of Illinois, for instructions as to whether the plaintiff should pay to the trustee under that will certain funds collected by him from the executor of the will of Moses W. Richardson, as the executor of the will of Rosa B. Richardson, the mother of Charles Howard Richardson, without awaiting the outcome of certain actions brought against the plaintiff by creditors of Charles Howard Richardson, otherwise barred by the special statute of limitations, in which they demanded the satisfaction of their claims out of the funds so collected by the plaintiff as being new assets of the estate of Charles Howard Richardson under R. L. c. 141, §§ 11, 18.

All the allegations of fact contained in the bill were admitted by the answers of the several defendants, and certain additional facts were incorporated in a stipulation executed and filed by all the parties. The case came on to be heard by *Loring, J.*, who by agreement of the parties reserved it and all questions arising therein for determination by the full court.

R. D. Weston, for the plaintiff, stated the case.

A. Lincoln, for the defendants *Hayden* and others.

W. G. Thompson, (*G. E. Mears* with him,) for the defendant *Burrage*.

Rugg, C. J. This is a bill in equity by the administrator *de bonis non* with the will annexed of the estate of Charles Howard Richardson for instructions as to what he shall do with funds in his hands. The controversy arises between general creditors of

the testator and the trustee appointed under his will to administer the trust created by its residuary clause. The general creditors of the testator contend that the funds in the plaintiff's hands are "new assets" under R. L. c. 141, §§ 11, 18, which lifts the bar of the statute of limitations upon certain conditions. The trustee combats that contention on several grounds and asserts that he is entitled to receive the entire fund.

The material facts are these: The testator died, his will was allowed and one Harding was appointed executor and gave due notice thereof in 1899. Harding filed no inventory or account until 1916. He resigned in 1913, when the plaintiff was appointed his successor, and gave due notice of his appointment. In his inventory filed in December, 1913, was included the item, under the designation a "claim" of uncertain value, out of which by far the largest part of the funds involved in this suit have come. The plaintiff succeeded in collecting a considerable sum on this claim in 1916. None of the funds received by the plaintiff were assets or property of the testator during his life. It was property over which he simply had a power of appointment. His mother created a spendthrift trust for his benefit during his life and gave him a general power of appointment by will over the principal. The funds in question accordingly were held by a trustee during the testator's life. The testator exercised the power of appointment by a general residuary clause in his will. *Stone v. Forbes*, 189 Mass. 163. *Howland v. Parker*, 200 Mass. 204, 207. The testator's estate never has been represented insolvent. By the first clause of his will he made a specific bequest of books, pictures, silverware and other articles of personal belongings, which were received by the legatee while Harding was executor, with his knowledge. Their value is not shown. That legatee is one of the defendant creditors, but the others had no knowledge of this property.

The proposition put forward in behalf of the creditors is that since property of a third person, not owned by the testator but over which he has exercised a general power of appointment, is deemed in equity to be assets of the estate of the person exercising the power so far as needed to make good a deficiency of his own property to pay his debts, it must likewise be regarded as "new assets" under the statute, when other necessary elements are

present. When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of this delegated authority takes as recipient of the bounty of the donor and not as legatee of the donee. *Walker v. Treasurer & Receiver General*, 221 Mass. 600, where authorities are collected. *Drake v. Attorney General*, 10 Cl. & F. 257, 286. The right to exercise the power is not property and cannot be reached by creditors. *Crawford v. Langmaid*, 171 Mass. 309, 311. On no theory of hard fact is the property appointed the property of the donee of the power. But very early equity grafted onto these bald facts a principle of fair dealing. That principle was founded on the idea that a man ought to pay his debts if he could. Equity assumed as matter of good conscience and sound morals that a man in debt could not honestly have meant to give property to his friends or relatives to the exclusion of his creditors, when he could give it to anybody he chose. Regardless of his actual intention, equity said that creditors should not go unpaid and volunteers profit through the exercise of a power of appointment. It was held that a man of integrity in debt having the general power to give away the property of another would or ought to prefer to give it to his creditors, if they could be paid in no other way, rather than to give it to persons who had no legal claim upon him. It is a doctrine established in the interest of good faith. Various phrases have been used by eminent chancery judges to express this principle and the reason for it, such as, that the courts "stop *in transitu*" property on its way from the donor to the appointee, that "the court ought to intercept it for the benefit of a creditor," and that "It would be a strange thing if volunteers . . . should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief." See *O'Grady v. Wilmot*, [1916] 2 A. C. 231, at page 270. This is another of numerous illustrations of the application by courts of "fundamental ethical rules of right and wrong" to the complicated affairs of mankind. See *Robinson v. Mollett*, L. R. 7 H. L. 802, 817; *Mabardy v. McHugh*, 202 Mass. 148, 150.

This is purely a doctrine of equity. It is plain that in law appointed property is not assets of the estate of the person exercising the power of appointment. Being a principle applied in equity alone, it commonly has been said that property so appointed should be deemed or considered or treated in equity a part of the assets of the estate of the donee of the power so far as necessary to pay his creditors' claims which otherwise would go unsatisfied. They often are referred to as equitable assets of the estate.

The doctrine had its origin in England. Its history, underlying basis and application were discussed with exhaustive fullness in *O'Grady v. Wilmot*, [1916] 2 A. C. 231. It was recognized in this Commonwealth first in 1879 in *Clapp v. Ingraham*, 126 Mass. 200, and has been invoked frequently since that time.

The power of appointment in the case at bar was exercised and became effective immediately upon the proof of the will of the testator. At that moment the fund left by his mother was disposed of. From that instant it was deemed in equity to be so far a part of his assets as to be subject to the demand of his creditors to the extent necessary to satisfy that part of their claims not paid by his own property, in preference to the claim of the voluntary appointees or legatees named in his will. *Clapp v. Ingraham*, 126 Mass. 200. *Harmon v. Weston*, 215 Mass. 242, 248. *Montague v. Silsbee*, 218 Mass. 107, 109. *Vinton v. Pratt*, 228 Mass. 468, 470. It became the duty of the creditors to determine whether the testator's own property would be sufficient to pay their debts, and if it was not, then to take proper steps to subject this fund to their satisfaction, if that course seemed best to them.

It does not appear how large was the estate of the testator. But there were some assets of his own, because the legatee took possession of the property described in the specific bequest contained in the first clause of the will. The plaintiff had collected a part of this appointed fund and included it in his inventory of the testator's estate filed on his appointment in 1913. In that inventory reference is made by name to the claim to the balance of the appointed property. The claim was then known, disclosed and avowed by the legal representative of the estate of the testator. The precise form in which it was inventoried is of no consequence in this case. Speaking with accuracy, it was a claim to assets of the estate of Rosa B. Richardson, the mother of the testa-

tor. But the difficulty in securing the fund arose from maladministration of that estate by her executor, Moses W. Richardson. It was sufficiently identified under the circumstances by the reference in the inventory to the claim against the estate of Moses W. Richardson, deceased, executor of the will of Rosa B. Richardson. The collection of the fund and the conversion of it into cash could not in any event be "new assets" within the meaning of those words in the statute. See *Fay v. Haskell*, 207 Mass. 207, 215, 217, where the earlier cases are reviewed by Mr. Justice Hammond, and *Horton v. Robinson*, 212 Mass. 248.

The general reference in the testator's will to the payment of his just debts cannot be regarded as an appointment of the property to the payment of his own debts. That direction is an ancient and common form with a quite different purpose and ordinarily confers nothing more than the obligation imposed by law. *Staigg v. Atkinson*, 144 Mass. 564, 571. *O'Grady v. Wilmot*, [1916] 2 A. C. 231, 274, 275. For an appointment in favor of creditors see *Vinton v. Pratt*, 228 Mass. 468.

It follows that under the circumstances here disclosed the fund was not new assets within a sound interpretation of those words in the statute now under consideration. The claims of the creditors are barred by the statute of limitations.

It becomes unnecessary to determine whether the words "new assets" as used in this statute under any circumstances refer to anything more than legal assets which belonged to the deceased in his lifetime, and whether on correct principles of statutory construction they include such equitable assets as these.

Decree is to be entered directing the plaintiff to pay the entire fund to the trustee under the will of Charles Howard Richardson.

So ordered.

JAMES McDONALD'S (dependents') CASE.

Suffolk. November 15, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Dependency.

Under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 7 (a), that a wife shall be presumed to have been wholly dependent for support "upon a husband with whom she lives at the time of his death," the living together of husband and wife imports actual enjoyment of the marriage relation under a common roof and cannot include prolonged absences, even though one of the two remains at home and the other expects to return, and, where the physical separation has been continued for more than a year for reasons of mere business expediency, it cannot be found that a wife who stayed at their home in Nova Scotia was living with her husband, who was employed in this Commonwealth, at the time of his death.

In a claim under the workmen's compensation act by the alleged dependent widow of a deceased employee, where it appears that the wife and five minor children of the employee lived in Nova Scotia in a house belonging to the wife, which was in good repair and had eight rooms in it, it cannot be found that the wife was wholly dependent for support upon her deceased husband. Following *Derinza's Case*, *ante*, 435.

Nor can it be found in the case stated above that the minor children of the employee were wholly dependent upon him for support.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, that Alice A. McDonald, the widow of James McDonald, the deceased employee, was living with him at the time of his death and accordingly was conclusively presumed to have been wholly dependent upon him for support, and also that she was in fact wholly dependent for support upon the employee, and also that the five minor children of the employee under eighteen years of age were in fact wholly dependent for support upon the earnings of the employee at the time of his injury and death, awarding to the widow a weekly payment of \$10 for a period of four hundred weeks from January 6, 1916, and to the five minor children, in equal shares of \$2 each, the sum of \$10 a week during the same period.

The case was heard by Fox, J. The evidence is described in

the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, and the insurer appealed.

G. Gleason, for the insurer.

James J. McCarthy, for the dependents.

RUGG, C. J. The deceased received mortal injury in the course of and arising out of his employment by a subscriber under the workmen's compensation act. St. 1911, c. 751.

His dependents, although aliens, are subjects of a friendly foreign nation and are not excluded from the benefits of the act. *Derinza's Case*, ante, 435.

The first point to be decided is whether the finding of the Industrial Accident Board that the wife of the deceased was living with him at the time of his death can be supported. The facts are that the deceased had a wife and five minor children, who lived in a house built by the husband upon land then or later owned by the wife in a small country settlement called Havre Voucher in Nova Scotia. The only industry there is a lobster factory. The husband had worked in the United States more or less since marriage. He went away every spring and came home in the autumn. He sent money home every month, and clothing to the wife and children. The relations of the deceased with his family always were pleasant. He left home in December, 1914, his wife remaining in Nova Scotia. It does not appear precisely where he went, but so far as his wife knew he was either in Rhode Island or Massachusetts. He was a carpenter by trade, and died on January 6, 1916, from injuries received on that date. Seemingly he had stayed away from home on this occasion considerably longer than on his previous trips to this State.

The words of the act as amended are that there shall be a conclusive presumption of the total dependency of "A wife upon a husband with whom she lives at the time of his death." Part II, § 7 (a). The meaning of these words as used in the act was discussed in *Nelson's Case*, 217 Mass. 467. They have been interpreted and applied in *Gallagher's Case*, 219 Mass. 140, *Newman's Case*, 222 Mass. 563, *Fierro's Case*, 223 Mass. 378, and *Gorski's Case*, 227 Mass. 456. What there has been said need not be repeated. A living together with reference to husband and wife imports actual enjoyment of the marriage relation under a common roof. It cannot be stretched to include prolonged absences,

even though one of the two may remain at home and the other may expect to return. In reason it seems to us that when the physical separation has been continued for more than a year, as in the case at bar, for reasons of mere business expediency, there is not a living together at the time of the death, even though there is a genuine purpose to resume cohabitation. It would have been simple for the Legislature to have said that the wife should be conclusively presumed to be totally dependent upon the husband unless through her fault she is living apart from him, if that had been its intent. This clause as originally enacted was amended by St. 1914, c. 708, § 3. No such simple change as that then was made, but another of quite different meaning, to the effect that a wife might recover as a total dependent if living apart from the husband for justifiable cause. This does not mean that a wife not living with her husband by reason of mutual agreement to that end shall be regarded as a total dependent. *Veber's Case*, 224 Mass. 86. The words actually used by the Legislature express a purpose to declare total dependency in those cases only where there is such living with reference to a home as to make it clear that there has been no suspension of the marriage relation, but to leave the question of dependency and its extent to be ascertained as a fact in each case where there has been a physical separation between husband and wife for a considerable period of time for any reason except desertion of the wife by the husband, or a living apart from the husband by the wife for justifiable cause. As applied to citizens of a State of the size of Massachusetts, with its present high standard of marital morality among those defined as employees by the act, there would appear to be ground for a law of that tenor. Actual physical separation for more than a year between a citizen husband and wife might be thought to require an examination of the facts as to dependency. As applied to cases like the present the Legislature may have thought that whether the support of aliens residing in foreign countries should be a burden upon Massachusetts industries ought to depend upon the actual extent of contribution to the support of his wife or family during the life of the employee. That is the meaning which the words of the statute express. Other decisions like *Ex parte Gilmore*, 3 M. G. & S. 967, *Walton v. Walton*, 76 Miss. 662, and *Potts v. Davenport*, 79 Ill. 455, where the kind of separa-

tion or desertion was raised, are so different in the issue presented as to afford no aid in the interpretation of the words used in the present statute. As was said in *Nelson's Case*, *ubi supra*, if there is anything inconsistent with this conclusion in *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, we are constrained not to follow it. The finding that the wife in the case at bar was totally dependent upon the husband because living with him at the time of his death, cannot be supported.

The board found as a fact that the wife was wholly dependent upon the earnings of the deceased for her support. The facts upon this point are that the wife and children lived in a house of eight rooms built by the husband upon land owned by an uncle of the wife, who, when he died, left a will. There was about an acre of land used as a yard. No vegetables were raised on it. There was a barn. A cow owned by the husband was kept, whose milk was used entirely by the family, none being sold. The tax bills were made out in the name of the husband and were paid out of his earnings. No insurance was carried on the house. The wife testified that she did not know what was a fair rental value of the house, because all the people in Havre Voucher owned their own houses. There was no evidence as to the value of the house and it yielded no income. There was evidence that the house was freshly painted and was a better looking house than the others near by. The evidence as to the title to the house and land need not be recited. The board found on appeal that it was in the wife. There was evidence in the testimony of a searcher of land titles and the will of the uncle of the widow to support that finding.

Upon these facts a finding of total dependency was not warranted. Where a wife owns a lot of land with an eight room house in good repair upon it, in which the family live, it cannot rightly be said that she is wholly dependent for support upon the wages of the husband. Payment of rent is an essential factor in the support of every family which does not have its housing supplied from sources other than the wages of the husband. Where the housing is provided from some other source, that is a substantial matter. Ownership of a house of the size and condition here shown is not so insignificant as to be negligible, as was the independent property in *Carter's Case*, 221 Mass. 105, *Buckley's Case*, 218 Mass. 354, and *Caliendo's Case*, 219 Mass. 498, but is too

material to be ignored, as in *Kenney's Case*, 222 Mass. 401, 404. The case upon this point is indistinguishable from *Derinza's Case*, *ante*, 435, just decided. It follows that the inference of total dependency of the wife as a matter of fact standing alone would be unwarranted by the other facts found.

The case is thrown open to be decided under the final paragraph of Part II, § 7, which provides that "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury," and Part V, § 2. *Newman's Case*, 222 Mass. 563, 568. *Fierro's Case*, 223 Mass. 378, 380.

There is a further finding that the minor children of the deceased were totally dependent upon him for support. For the reasons stated at length in *Derinza's Case*, *ante*, 435, this finding cannot be supported.

It follows that there are such substantial errors on this record as to require a reversal of the decree. The case must be remanded to the Industrial Accident Board for further hearing upon the question of the extent of actual dependency.

So ordered.

RUSSELL A. RICHARDS vs. GEORGE B. MORISON & others.

Plymouth. November 15, 16, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Social Club, Expulsion of member. *Corporation*, Social club.

In an action by one who had been a member of a social club against the members of the governing committee of the club for the alleged unlawful expulsion of the plaintiff as a member, the courts do not investigate the question whether the decision of the committee was right or wrong, and go no further than to ascertain whether the essential formalities required by the constitution and by-laws of the club have been complied with, whether the proceedings have been regular, whether the cause assigned was one sufficient in law to warrant expulsion, whether the expelled member was given a fair chance to present his side of the controversy so as to satisfy the requirements of natural justice, whether the decision was within the scope of the jurisdiction of the committee, whether it was reached in good faith and whether the action appears to have been taken within the exercise of sound reason or to have been capricious, arbitrary and irrational,

with such possible modification or amplification of these inquiries as the particular circumstances of a case may require.

Where the constitution of a social club gives the governing committee jurisdiction over the expulsion of members in a manner there prescribed for "conduct injurious to the good order, peace, or interest of the association," the making of a false charge of misappropriation of property of the club by a member of the club who is a member of the governing committee can be found by the governing committee to be a sufficient ground for expulsion.

In an action against the governing committee of a social club for the alleged unlawful expulsion of the plaintiff for the cause named above, it is not evidence of malice or of bad faith on the part of the defendants that they felt aggrieved by the conduct of the plaintiff, or that they instituted proceedings for the plaintiff's expulsion promptly without waiting for usual but unnecessary formalities, or that they consulted an attorney at law and followed his advice as to procedure, or that they refused to allow the plaintiff to be represented by counsel at the hearing before the committee, or that slanders against the plaintiff, not relating to the cause for which the plaintiff was expelled and not shown to have emanated from the defendants, were circulated about the club before the vote of expulsion.

In the case above referred to it was *said* by this court that a careful examination of the whole evidence showed that it did not justify the inference that the defendants did not keep within the limits of their jurisdiction as defined by the constitution of the club or that they did not act in good faith or that they were controlled by malice.

TORT against the members of the governing committee of an incorporated social club in Boston known as the Boston Athletic Association for the alleged unlawful expulsion of the plaintiff as a member on May 25, 1914. Writ dated June 26, 1914.

In the Superior Court the case was referred to an auditor. He filed a report stating his findings of fact and also the following conclusions:

"1. That the defendants were justified in voting to expel the plaintiff, and that the various steps taken by them resulting in his expulsion were properly taken.

"2. That there was no conspiracy on the part of the defendants, or any of them, as alleged in the first count of the plaintiff's declaration.

"3. That the defendants did not maliciously and falsely charge the plaintiff with conduct injurious to the good order, peace, and interest of the association; and did not maliciously, wrongfully, and in bad faith hear said charge, find it to be true, and thereupon expel him from the association, all as alleged in the declaration.

"4. That the defendants gave the plaintiff a fair, adequate and

proper opportunity to be heard in his own defence, which was denied in the declaration.

"5. That the defendants, individually or collectively, are not liable to the plaintiff in this action.

"And I so find."

Later the case was tried before *Fox*, J. The evidence is described in the opinion. The judge refused to order a verdict for the defendants and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1.

The plaintiff filed a motion for a new trial, on the ground that the damages were inadequate. This motion was heard by the judge, who ruled that, while in his opinion the plaintiff was not entitled to any damages or to a verdict, he would not order a new trial because of the expense to the county.

The defendants and the plaintiff both alleged exceptions.

T. Hunt, for the defendants.

J. J. Feely, for the plaintiff.

RUGG, C. J. This is an action of tort whereby the plaintiff seeks to recover damages alleged to have been sustained by his expulsion from the Boston Athletic Association, a private club organized as a Massachusetts corporation. The defendants are twenty persons constituting the governing committee of that association. The declaration in substance charges that the defendants, being actuated by malice, conspired to deprive him of his membership in the organization and to that end charged him falsely with conduct injurious to the good of the association, tried him upon such charges and expelled him. The case was heard by an auditor, who found in favor of the defendants. It then was tried to a jury, whose verdict was for the plaintiff in nominal damages. It is now before us on the exceptions of both parties.

The plaintiff, by becoming a member of the association, agreed to be bound by its rules and subject to its discipline. As one of the incidents of membership, he consented to accept liability to expulsion, ordered in accordance with its regulations. When the action of the association or of its officers is challenged in respect to the exercise of the power of expulsion, the court does not sit in review upon the wisdom or expediency of their conduct. The decision of the organization and its officers acting in good

faith in accordance with the rules on that subject is the final tribunal. There is no general appeal to the courts. The courts do not investigate the question whether the decision was right or wrong, but go no further than to ascertain whether the essential formalities required by the constitution and by-laws of the association have been complied with, whether the proceedings have been regular, whether the cause assigned is one sufficient in law to warrant expulsion, whether the member has been given a fair chance to present his side of the controversy so as to satisfy the requirements of natural justice, whether the decision is within the scope of the jurisdiction and whether it has been reached in good faith, and whether the action appears to have been within an exercise of sound reason or to have been capricious, arbitrary and irrational. This general statement may require modification or amplification according to particular circumstances, but is sufficient for the case at bar. *Spilman v. Home Circle*, 157 Mass. 128. *Carter v. Papineau*, 222 Mass. 464. *Shinsky v. Tracey*, 226 Mass. 21. *Dawkins v. Antrobus*, 17 Ch. D. 615. *Lewis v. Wilson*, 121 N. Y. 284. *Green v. Board of Trade*, 174 Ill. 585. *Lambert v. Addison*, 46 L. T. (N. S.) 20. *Fisher v. Keane*, 11 Ch. D. 353, 360. *Wilcox v. Royal Arcanum*, 210 N. Y. 370, 376.

A brief narration of the circumstances is necessary. The plaintiff, with six other members of the association, was appointed on a committee "to investigate the affairs of the association and to devise some means for the purpose of helping the present governing board to reduce the running expenses of the club." He alone made a minority report, in which he sharply criticized the management of the governing board, saying among other matters that their methods and conduct rendered "possible" "the misappropriation of large sums" and "liberal amounts" without fear of detection. The reports of the majority and minority of the committee were received and placed on file at a meeting of the club held on April 14. The annual meeting was held on April 27. It does not appear that either of these reports was laid before that meeting. But however that may be, the plaintiff addressed that meeting and said "The minority report I read at the last meeting directly charged misappropriation of club property. There has been no cognizance of that taken by the governing committee. . . . I can prove any

statement I have made." The plaintiff's minority report construed as a written instrument made no charge of "misappropriation" of club property by any member of the governing committee. It criticized with severity the methods of management and of accounting sanctioned by the committee, but the only charge was that thereby the misappropriation of large sums was made possible without fear of detection. In connection with all that was said, however, that misappropriation was not directly charged against anybody in particular or, if against anybody, certainly not against the members of the governing board. But at the annual meeting the plaintiff amplified and specified his meaning. He then made the direct accusation that club property had been misappropriated and said in substance that he intended to make that definite charge in his report and supposed and assumed that he had done so. These remarks at the annual meeting were not in the line of his duty as a member of the committee of seven. Its work had been ended and his report as one of its members had been made and by the club received and filed. As a member of the club he had a right at the annual meeting to discuss its affairs. But he ran the risk of being called to account for conduct unbecoming a member if he charged the misappropriation of club property without just ground. His remarks at the annual meeting, however, did not name the persons against whom his charge was directed. For aught that appeared from this statement, still the misappropriation might have been, not by members of the club but by employees, made possible by the lax methods by which the affairs of the club were administered. The next step was that on May 1 the governing committee voted to request the plaintiff "to submit to the committee, in writing, his specific charges and evidence, on or before May 8, 1914; and that if he fails to comply with this requirement, the committee take action under Article XXIV of the constitution." That article will be considered later. A copy of this vote with the letter of transmittal was sent to the plaintiff on May 2. In response to a request from the plaintiff, the president of the club, the first named defendant, handed or caused to be handed to the plaintiff a stenographic copy of his remarks at the annual meeting. On May 8 the plaintiff addressed to the governing committee in reply to its note a communication containing "all evidence tend-

ing to substantiate certain alleged statements made by me at the annual meeting." He then quoted the stenographic report of his remarks at the annual meeting and proceeded to set forth a statement by one Gibson, a previous employee of the club, to the plaintiff and two other members of the club, to the effect that one Conway, the head bookkeeper, once had said "that it was a shame that Keates was drawing so much money out of the treasury and that if he kept it up, there wouldn't be any left. Also that Keates has taken some of his (Conway's) office furniture and had replaced it with some not as good. This remark led me as a member of the committee of seven to look into the expenditures that were under Mr. Keates' supervision, and for which he receives \$1,500. I found included in the expenditures of \$64,749.55, the following items," amounting to \$14,587.50 from three different firms. "I then sought to learn if the club had received any credit for any of the old furnishings. I first inquired of the head bookkeeper if there were any credits on the club books, and he assured me there were not. . . . I was unable to obtain any satisfactory explanation, and I, therefore, stated in my minority report that for this replaced equipment, there was not a penny of credit on the books. Before the annual meeting I asked Mr. Keates in the presence of a number of members of the club, if he could give me any explanation and he replied that he knew nothing about it." Without quoting further it is manifest that in this letter, in conjunction with his oral remarks at the annual meeting with the reference then made to his minority report, the plaintiff charged misappropriation of club property by Mr. Keates, who at this time was a member of the governing committee. This communication from the plaintiff was considered by the governing committee. One of the governing committee wrote respecting the plaintiff's statement to Mr. Conway, who was out of the Commonwealth, and a reply was received to the effect that Gibson had a dislike for Keates and that Gibson's statement was false, and that he, Conway, never made any such remark as was attributed to him. Chartered accountants made an investigation and reported that the only articles of the club which had been removed from the club building and which they were unable to trace were one chair, "which may have been otherwise described on its return and thus be difficult to identify," and "some old linoleum, window

shades, and electric light fixtures." The correspondence and papers were laid before a lawyer, who after examination wrote a long letter of advice to the effect that no charge of wrongdoing had been made by the plaintiff against any one except Keates, and outlining correctly the procedure which the committee should take if it chose to act under Article XXIV of the by-laws. Thereafter a vote was taken by the governing committee that the plaintiff "be charged with conduct injurious to the good order, peace and interest of the association, in that he has made without justification false accusations against Mr. George W. Keates, a fellow member . . . of misappropriation of club furniture." Notice was sent to the plaintiff and a hearing set for May 19. The plaintiff demanded that he be allowed to bring his own stenographer and several members of the club and be represented by counsel, and that all his witnesses be present during the examination. This demand was refused, but the plaintiff was told that the testimony of such persons as he might produce would be heard and considered. At the time appointed for hearing the correspondence all was read. The plaintiff asked for proof that he had made charges against Mr. Keates. The president replied that the committee was not there to make out a case against the plaintiff, but to hear him, and that they had become cognizant of his conduct. Mr. Anthony, one of the committee, made a statement and read letters tending to show that the club had lost no property and that all furniture and fixtures were accounted for, and that all these facts might have been ascertained by any member of the club who made the effort. The plaintiff in response to inquiry replied that he had nothing further to say. The hearing was closed and the vote of expulsion was passed.

The authority of the governing committee in this connection is stated in Article XXIV of the constitution of the association, in these words: "If any member shall be charged, in writing, . . . with conduct injurious to the good order, peace, or interest of the association . . . or if the committee shall become cognizant of such conduct, the committee shall thereupon inform the member charged, in writing; and if upon inquiry, and after giving the person so charged an opportunity to be heard, the governing committee shall be satisfied of the truth of the charge, and that the same demands such action," expulsion may follow. The

governing committee acted in conformity to the provisions of this article throughout. The charge made by the plaintiff was all embodied in a statement in writing over his own signature. It was in substance a complaint that Mr. Keates had misappropriated property. That the plaintiff had made it required no proof. To make such a charge unless it was true or appeared to be true well might be thought by any committee "conduct injurious to the good order, peace, or interest of the association."

The plaintiff contends, however, that there was evidence of malice and bad faith on the part of the governing committee, and that they did not act upon probable cause. He supports that contention on the grounds (1) that the members of the governing committee testified that they felt incensed and insulted by the charges of the plaintiff, (2) that they acted with unseemly haste in waiving the required notice for their first meeting after the annual meeting, (3) that the governing committee consulted with an attorney who prepared of his own motion according to the testimony an outline of the procedure which was followed in expelling the plaintiff, (4) that the governing committee had talked the matter over before the hearing and their vote of expulsion was simply the registration of a decision theretofore made, (5) that the plaintiff was refused the privilege of a stenographer and an attorney, (6) that slanders against the plaintiff were circulated about the club between the annual meeting and the vote of expulsion.

The governing committee was the only body charged by the constitution of the association with investigating such charges. Because they felt aggrieved by the conduct of the plaintiff did not disqualify them from acting. They alone could act in the premises. It is not malice or bad faith to do promptly or without waiting for usual formalities an act which otherwise is proper. It was in itself sagacious and savoring of justice to make a full disclosure of all the facts to an attorney and follow his advice as to procedure. Of course, if the charge against the plaintiff was voted not sustained, no special form was required. It was only in the event that the vote should be for his expulsion that procedure was important. That this was furnished in advance by a competent attorney was not evidence of malice or bad faith. It was not unnatural that the members of the governing committee should

have felt incensed that the charge against Keates should have been made in form and substance as it was by the plaintiff upon such weak grounds. There is nothing to indicate that they were not ready to act fairly upon the evidence that might be presented at the hearing, or that they had prejudged the cause. At the hearing before the committee the position taken by them that they had become cognizant of the conduct of the plaintiff was correct. It was not for them to go forward. It was clearly the duty of the plaintiff then to justify what he had said. The committee was not required to permit the plaintiff to be represented by counsel at the hearing. It was not required by Article XXIV. There was no adversary party. It was a simple inquiry into a defined matter by procedure which inevitably would be more or less informal and at which rules of evidence would not be followed. No suggestion has come to our attention indicating that the rights of the plaintiff were in any way jeopardized by the refusal to permit him to be represented by counsel. There are numerous instances of bodies making decisions of importance where attorneys are not ordinarily present. *Clark v. New England Telephone & Telegraph Co. ante*, 1, and cases collected. The slanders about the plaintiff were not shown to have emanated from the defendants. The fact that they were in circulation and came to the attention of the members of the governing committee was no evidence of their bad faith. It could not rationally have been expected that the committee individually or collectively should have talked with the plaintiff concerning them. They did not relate in any degree to the cause for which he was expelled.

A careful examination of the whole evidence, which need not further be narrated, demonstrates that it did not justify the inference that the defendants did not keep within the limits of the governing article of the constitution of the association, that they did not vote in good faith or that they were controlled by malice.

This aspect of the case is decisive. The defendants' request for a ruling as matter of law that the plaintiff could not recover should have been granted.

It becomes unnecessary to consider in detail the plaintiff's exceptions. His requests for rulings all become immaterial. He has argued no exception to evidence offered on good faith and

malice which was excluded. An examination of the record fails to disclose any error in this regard. His exceptions are overruled.

The defendants' exceptions must be sustained. The case was heard by an auditor. The trial by jury was prolonged and full, and ample opportunity given to the plaintiff to present every aspect of his case. It is a case appropriate for the exercise of the power conferred by St. 1909, c. 236. In accordance with its terms, judgment is to be entered for the defendants.

So ordered.

HEATH HUGHES vs. JOSEPH E. WILLIAMS.

Middlesex. November 16, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Presumptions and burden of proof. Deed, Unrecorded.

Where on a petition for the registration of the title to land the case is taken by appeal to the Superior Court for the trial of the issue, whether an attaching creditor under whom the plaintiff claims title had before his attachment of the land actual knowledge of the existence of an unrecorded deed under which the defendant claims title, and where it is undisputed that the petitioner's record title is on its face a good one and that to defeat it the respondent must prove that the petitioner's predecessor in title had knowledge of the unrecorded deed before he made his attachment, the burden of proof is on the respondent to establish this affirmative defence.

PETITION, filed in the Land Court on August 11, 1909, for the registration of the title to a parcel of land with buildings thereon on the southerly side of Cambridge Street in Cambridge.

The petition was heard in the Land Court by *Davis, J.*, who ordered a decree for the petitioner. Upon an appeal to the Superior Court by the respondent under St. 1905, c. 288, four issues were tried before *Hardy, J.* The findings upon the issues were favorable to the respondent; and the petitioner alleged exceptions, which, in a decision reported in 218 Mass. 448, were sustained by this court in relation only to the trial of the first issue and it was ordered that the verdict should stand as to all the issues except the first, to which the new trial was to be confined.

The first issue was as follows: "1. Did James H. Duckrey before his attachment of the property in question have actual knowledge of the existence of the deed back from Jones to Williams July 5, 1901?"

There was a new trial of this issue before *Wait*, J. There was evidence from the respondent's witnesses tending to show that Duckrey had the knowledge specified in the issue, and there was evidence from the witnesses for the petitioner and also the report of the judge of the Land Court, which was read in evidence, tending to show that Duckrey had no such knowledge.

The judge instructed the jury that the burden of proof was upon the petitioner to satisfy them that Duckrey did not have the knowledge called for by the issue.

The jury answered the issue, "Yes," and the petitioner 'alleged exceptions to the instruction in regard to the burden of proof given to the jury as above stated.

A. P. Gay, for the petitioner.

F. Paul, (*G. C. Dickson* with him,) for the respondent.

Rugg, C. J. This is a petition for the registration of title to land. It was appealed from the Land Court to the Superior Court, where it was tried to a jury upon four issues. The case was brought before this court on exceptions, and there was found to be no error of law in the trial of three of these issues, but as to the other issue exceptions were sustained and a new trial was ordered confined to that issue. 218 Mass. 448. The material dates and facts respecting the chain of title are these: On April 1, 1896, the respondent Williams acquired title to the locus by a deed which was duly recorded. He retained that title until July 5, 1901, when he conveyed the land to one Jones by a deed duly recorded; on the same date he took a deed back from Jones to himself, which was not recorded until March, 1908. Meanwhile, on May 24, 1906, while the record title stood in the name of Jones, one Duckrey brought an action against Jones and attached the locus, which was sold on execution sale to the petitioner, and a sheriff's deed thereof to him dated April 10, 1909, was duly recorded. The petitioner alleges that he is the owner of the land by reason of this sheriff's deed. The respondent pleaded that he was owner by virtue of his deed of April 1, 1896, and of the deed from Jones. The previous trial resulted in findings that Williams protested at

the execution sale, and that the petitioner, before his purchase at the execution sale, was informed that the beneficial interest was in Williams and that Jones had a bare record title. The single question submitted at the last trial was this: "Did James H. Duckrey, before his attachment of the property in question, have actual knowledge of the existence of the deed back from Jones to Williams of July 5, 1901?" The presiding judge ruled that the burden of proof was on the petitioner to satisfy the jury that Duckrey did not have such knowledge. The point now presented for decision is the correctness of that ruling.

It is provided by R. L. c. 127, § 4, that "A conveyance of an estate in fee simple . . . shall not be valid as against any person, except the grantor . . . his heirs and devisees and persons having actual notice of it" unless it is recorded.

The burden of proving that he was entitled to the registration of the title to the premises rested upon the petitioner, and remained upon him throughout. *Temple v. Benson*, 213 Mass. 128, 132. *Hughes v. Williams*, 218 Mass. 448, 449.

The petitioner's title appeared to be perfect on the record. It could be defeated only provided that Duckrey, the attaching creditor in the action against Jones, had actual knowledge of the unrecorded deed from his debtor, Jones, to the respondent, and provided it appeared further that the petitioner himself at the time of his purchase also had such actual knowledge. The respondent did not attack the sufficiency of the petitioner's title on the record, nor did he assail the validity of any instrument through which the petitioner claimed title; but he asserted title in himself. On the strength of facts which he alleged existed outside the record, namely, actual knowledge by Duckrey at the time of making his attachment of the existence of the deed to himself and actual knowledge by the petitioner of the same fact at the time of his purchase. If these were the facts, the respondent was entitled to prevail under the terms of the statutes. *Wenz v. Pastene*, 209 Mass. 359. But this assertion by the respondent was in the nature of a confession of the record title of the petitioner and an avoidance of its natural force and effect by the existence of extraneous facts, which as matter of common honesty and under the statute would prevent the petitioner from taking advantage of his clear record title.

The statement of the legal principle where the burden of proof rests is plain. The party who makes and is required to make an assertion of a fact in order to set forth a case as matter of law entitling him to prevail, and whose case requires the proof of that fact, has at all times the burden of proving such fact. But where the party upon whom the burden of proof is cast offers competent proof of that fact, and his adversary instead of producing proof to negative that same fact proposes to show another and a distinct fact which avoids the effect of the first fact, then the burden of proof rests upon the party proposing to show the latter fact. This is an affirmative defence, the burden of proving which rests upon the party asserting it. *Powers v. Russell*, 13 Pick. 69, 76, 77. *Wylie v. Marinofsky*, 201 Mass. 583, 584. *Wood v. Blanchard*, 212 Mass. 53, 56. *Stocker v. Foster*, 178 Mass. 591, 600, 601. *Parker v. Murphy*, 215 Mass. 72, 75.

The practical application of the rule oftentimes raises questions of difficulty. Several cases have arisen where the burden of proof of the "actual notice" mentioned in the statute has been referred to. In *Pomroy v. Stevens*, 11 Met. 244, at page 248, it was said "the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed." In *Dooley v. Wolcott*, 4 Allen, 406, the trial judge instructed the jury that it was incumbent upon the tenant, who relied upon an unrecorded deed, to prove that the demandant had actual notice of it, and it was said at page 409, "Upon the question of notice to the demandant of the tenant's prior unrecorded deed, and as to the right of the tenant to maintain his title thereby, the court properly instructed the jury." In *Lamb v. Pierce*, 113 Mass. 72, the defendant relied upon an unrecorded deed. It was said, at page 74, "this statute requires that the plaintiff must be shown to have had actual notice that there had been a conveyance to the defendant of the estate . . . the party who claims under an unrecorded deed must prove that the subsequent purchaser had actual knowledge or notice of such deed." In all these cases as they were presented the burden was upon the tenant in a real action, or upon the defendant in an action of trespass, and hence what has been quoted from these opinions is precisely applicable to the case at bar. It also is said in Jackson on Real Actions, page 158, "If the defendant . . .

undertakes to show a better title in himself, he then becomes actor, and must show his title with the same certainty that was before required of the plaintiff."

The case is somewhat analogous to insurance policies, where the burden of showing that death or accident resulted from excepted or prohibited risks added to the main contract by way of proviso rests upon the insurer. *Nichols v. Commercial Travellers' Eastern Accident Association*, 221 Mass. 540, and cases collected at page 546. It is not unlike the classification of goods as inflammable under exceptions in a bill of lading, the burden of proving which rests upon the carrier. *A. J. Tower Co. v. Southern Pacific Co.* 184 Mass. 472. It is distinguishable from cases arising under the negotiable instruments act, where by the statute the burden of proving want of notice of infirmity in a note is cast upon the holder, *Phillips v. Eldridge*, 221 Mass. 103, and from cases where the matter of defence, though apparently somewhat special, really strikes at the root of a fact essential to the support of the plaintiff's case. *Central Bridge Corp. v. Butler*, 2 Gray, 130. *Sohier v. Norwich Fire Ins. Co.* 11 Allen, 336, 338. *Cohen v. Longarini*, 207 Mass. 556. The case at bar also is distinguishable from the decision as to waiver of his rights by the respondent or estoppel against asserting them, the burden of proving which was held when the case was here before to be upon the petitioner. That was an affirmative issue, and the burden rested upon the one who set it up, namely, upon the petitioner.

The result is that the burden of proving the issue in the case at bar rested upon the respondent.

Exceptions sustained.

ZAROUHI JENANYAN & others vs. ALTA N. J. FISHER & others.

Suffolk. November 20, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Master's report.

In a suit in equity that was referred to a master, where the evidence is not reported, the findings of the master must stand if the facts set out in the record are sufficient to justify directly or by implication all the conclusions reached by him.

BILL IN EQUITY, filed in the Superior Court in its substituted form on October 18, 1915, to set aside a deed to the defendant Alta N. J. Fisher dated September 23, 1914, for the reasons set forth in the allegations of the bill, as described in the opinion.

The case was referred to a master, who filed a report in which he found, among other things, that the deed to the defendant Alta N. J. Fisher, sought to be set aside, was not obtained through fraud or deceit and was a valid instrument.

The case was heard by *Jenney, J.*, upon the plaintiffs' exceptions to the master's report. He made an interlocutory decree that the exceptions to the report be overruled and that the report be confirmed. Later by order of the judge a final decree was entered, containing orders relating to the various parties in accordance with the findings of the master's report. The plaintiffs appealed.

J. S. Richardson & J. E. Galvin, for the plaintiffs.

H. Loewenberg, (*G. L. Harden* with him,) for the defendants Alta N. J. and Charles B. Fisher.

C. C. Barton, Jr., for the defendant Exchange Trust Company.

G. A. Saltmarsh, defendant, *pro se*.

F. N. Nay, for the defendant William W. Babcock, submitted a brief.

RUGG, C. J. The allegations of this bill summarily stated are that the first named plaintiff, hereafter called the plaintiff, was the owner of a parcel of land in Revere; that she gave to the defendant Babcock a mortgage for \$18,000, to be used in the construction of a building; that several other loan transactions

were had; that finally upon a search at the registry of deeds it was found that an instrument purporting to be a deed of the land from the plaintiff to the defendant Alta N. J. Fisher was recorded, together with a mortgage thereof from said Fisher to the Exchange Trust Company, and a second mortgage to one Bond; that this deed and these mortgages were without the knowledge and consent of the plaintiff and that the deed to said Fisher was signed by the plaintiff in blank and fraudulently filled in as a deed to Fisher; that Babcock had rendered no account and had discharged his mortgage. The prayers are that the deed to Fisher and the two mortgages be declared null and void, and for an accounting and other relief.

All the defendants appeared and answered. The case was sent to a master, who filed a long report setting forth in detail the numerous transactions of the various parties respecting the parcel of land and the block erected thereon. His findings upon all decisive issues are categorically contrary to averments in the bill of complaint. He finds upon the crucial point respecting the deed from the plaintiff to Alta N. J. Fisher in substance that it was intelligently executed and is a valid instrument, and that no one of the allegations as to fraud, the instrument being a blank without seals when signed, and folded so as to conceal its true purport and incompleteness and want of acknowledgment by the grantors, was established and proved. On the contrary he finds that the deed was executed because large sums of money had been advanced by Fisher toward the construction of the block, for a considerable part of which she has received no payment or security whatever, except the deed. He finds also that at the time it was executed there was an understanding by the parties for a reconveyance by Fisher upon certain conditions.

A large number of objections and exceptions were filed to the master's report by the plaintiffs. These chiefly relate to findings of fact and to arguments upon evidence. But, as the evidence was not reported, no question of fact is presented to this court and the findings of the master must stand.

The finding that the deed from the plaintiff to Mrs. Fisher "was not obtained through fraud or deceit and is a valid instrument," imports that it was duly executed and delivered in such form and under such circumstances as would pass a valid title.

This disposes of all contentions of the plaintiffs that it was incomplete, was signed by mistake or misrepresentation, was without seals, and was not delivered by the authority of the plaintiff with a purpose to transfer the title. The facts which are set out in the record are sufficient to justify by implication all the conclusions reached. *Haskell v. Merrill*, 179 Mass. 120, 123. There is nothing in the contention that the Exchange Trust Company is not entitled to the rights apparently secured to it by its mortgage.

It seems pretty plain from the record that the defendant Fisher has advanced large sums of money in good faith for the benefit of the plaintiff, for which she has no security or return whatsoever, except the deed to her here assailed. There is no question of law disclosed on the record which requires further discussion.

Decree affirmed with costs.

DONALD M. HILL & others, executors, *vs.* TREASURER AND
RECEIVER GENERAL & others.

Suffolk. November 21, 22, 1917. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions. Power.

In a case to which the provisions of St. 1909, c. 527, § 8, do not apply, where a testator, who left debts exceeding by a large sum the amount of his own property, exercised by his will a general power of appointment given him by the will of his father, appointing the principal of a trust fund to certain persons named, a legacy and succession tax under St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1, cannot be levied on the amount of the entire fund appointed but only on the balance of that fund which actually goes to the appointees after the payment of the debts of the testator; because the portion of the fund applied to the payment of the testator's debts is so diverted and applied by the law as administered in courts of equity and does not pass to any one by the will of the donee of the power nor by the will of the donor.

PETITION, filed in the Probate Court for the county of Suffolk on March 19, 1917, under St. 1909, c. 490, Part IV, §§ 20, 21, by the executors of the will of Warren M. Hill, late of Boston, against the Treasurer and Receiver General for the abatement of a legacy

and succession tax alleged to have been assessed unlawfully by an excess of \$2,126.10, because in determining the amount of the property on which the tax should be imposed the Tax Commissioner failed to deduct from the amount of a fund appointed to certain persons by the will of the testator the part of such fund which had been applied to the payment of the testator's debts.

The Probate Court made a decree that the tax be abated, and the Treasurer and Receiver General appealed.

In the Supreme Judicial Court the case came on to be heard by *Crosby, J.*, who at the request of the parties reserved it for determination by the full court.

W. H. Hitchcock, Assistant Attorney General, for the Treasurer and Receiver General.

C. L. Favinger, (*D. M. Hill* with him,) for the petitioners.

RUGG, C. J. This is a petition under the tax act, St. 1909, c. 490, Part IV, §§ 20, 21, for the abatement of a succession tax. The relevant facts are that William H. Hill died in 1913, a resident of this Commonwealth. He created by will a trust fund, of which his son, Warren M. Hill, was given the income during his life, and general power of appointment of the principal by will. The son died in 1915, having exercised the power. He left debts exceeding his own property by more than \$100,000. The tax commissioner levied a succession tax on the entire fund appointed, so far as taxable, on the basis of the relationship of the appointees to the donor of the power. The petitioners contend that there should first be deducted from the fund the portion needed to pay the debts of the son, so far as not satisfied out of his own estate, and that the tax should be levied only on the balance, which is the amount going to the persons actually appointed to receive the fund. This is the issue to be decided.

The governing provision of the tax act is in Part IV, § 1, as amended by St. 1912, c. 678, § 1, in these words: "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein belonging to inhabitants of the Commonwealth . . . which shall pass by will . . . shall be subject to a tax." It is a familiar canon in the interpretation of tax laws that they are to be construed strictly. If the right to the tax is not conferred by the plain words of the statutes, it is not to be extended by implication. If it is not within the letter, it is

vain to invoke the spirit of the tax law. *City National Bank v. Charles Baker Co.* 180 Mass. 40. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329.

It is settled that, the donee having exercised the power, the property appointed becomes in equity assets of his estate, so far as needed to pay his debts, to the exclusion of the persons appointed. *Clapp v. Ingraham*, 126 Mass. 200. *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 591. *Thompson v. Pew*, 214 Mass. 520, 523. *Shattuck v. Burrage*, ante, 448, and cases there collected. The property, however, was the property of the donor of the power. The donee had no title to it. He simply had the privilege, if he chose to exercise it, of disposing by will of property of the donor. He was the deputy of the donor in disposing of the latter's property. This was decided before the enactment of the succession tax law. Therefore, it was inevitable that it should be held in the application of the succession tax law that the assessment should be levied upon the theory that the property appointed was that of the donor, and not of the donee of the power. *Emmons v. Shaw*, 171 Mass. 410. *Walker v. Treasurer & Receiver General*, 221 Mass. 600, and cases there collected. That was changed by St. 1909, c. 527, § 8, as to some classes of estates, but it is conceded that that statute is not applicable to the present facts.

The doctrine that appointed property shall be regarded as assets of the estate of the donee who has exercised a general power of appointment is purely equitable. It rests on the fundamental idea that a man ought to pay his debts when he has the power to do so, rather than to give property to those who are not his creditors. It is not founded on the actual intent of the one who has exercised the power. This principle of equity disregards the desires of the donor in creating the power, deprives the donee of the untrammelled authority conferred upon him in terms, and to the extent of its scope does violence to the manifest design of the donee in exercising the appointment. It would operate even in the face of his testamentary declaration to the contrary. Equity seizes the property on its way from the donor to the appointee and applies it to the satisfaction of the obligations of the appointor.

The irresistible consequence of these principles is that the appointed property does not pass by the will of the donee of the

power. Perhaps in spite of the express words of the will of the donee, and certainly in opposition to its plain implication, the appointed property is diverted to the payment of an equitable charge upon it. It is not transmitted according to the will. Its course is directed by the law, regardless of the provisions of the will. The exercise of the power of appointment by will sets in motion another and different force quite outside itself, namely, the equitable doctrine, which in itself is the primary and sole direct cause of the transmission of the property to the creditors of the donee. The execution of the power is the remote condition, not the immediate antecedent of that result. The appropriation of so much of the appointed property as is necessary to pay the donee's debts is the consequence not of the will, but of the operation of principles of equity. If there were no appointment by will, the disposition of the property would be different. But that circumstance is not enough to support the contention that the property thus appointed passes by will, when in fact its disposition is or may be contrary to the will. It does not pass by will any more than does property owned by a testator, which does not go to his legatees because used in the payment of his debts. The disposition of the appointed property is regulated by the law, not by the law of wills nor by the law of intestate succession, nor by the law of deeds, grants or gifts, but by the law as administered by a court of equity in the interest of the mandate of common honesty to the effect that one should be just before he is generous and pay his debts before he makes gifts. Hence it is not within the terms of the taxing statutes. See *Palmer v. Treasurer & Receiver General*, 222 Mass. 263; *Attorney General v. Clark*, 222 Mass. 291. This conclusion is in harmony with the reasoning and the decision of *O'Grady v. Wilmot*, [1916] 2 A. C. 231, where the subject of equitable assets of this sort and their liability to taxation is discussed at large with amplitude of review of the English cases. The fact that the appointed fund is turned over to the executor of the appointor arises merely as matter of convenience of administration and not of strict legal right. *Olney v. Balch*, 154 Mass. 318.

The general direction in the will of the donee of the power to pay his debts is not an appointment of this property to his creditors. *Shattuck v. Burrage*, ante, 448.

It follows that the succession to this appointed property ap-

propriated to the payment of the debts of the donee is not by will, and it does not pass by will.

It becomes unnecessary to consider other questions raised.

Decree of Probate Court affirmed.

JOHN T. FARNHAM & another vs. LENOX MOTOR CAR
COMPANY.

SAME vs. DANIEL S. HOWARD, JR., & others.

Plymouth. Suffolk. November 22, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Constitutional Law, Right to trial by jury. Jury and Jurors. Practice, Civil, Auditor. Rules of Court. Waiver.

It here was *pointed out* as manifest that an ordinary action of contract is a controversy concerning property, for which the right to a trial by jury is assured by art. 15 of the Declaration of Rights.

The provision of Rule 31 of the Superior Court, relating to auditors, that "On the coming in of the auditor's report, either party may move for entry of judgment according to said report; and the court, thereupon, shall order such judgment to be entered, unless, within a time stated, cause appears or is shown to the contrary," is not in conflict with the right to a trial by jury as guaranteed by art. 15 of the Declaration of Rights, and, where it appears that a trial by jury has been claimed seasonably by a party to an action and is insisted on by such party, and where there is a real issue of fact to be tried, a cause is shown under the rule why judgment should not be entered on the auditor's report.

Where in an action of contract the defendant has claimed seasonably a trial by jury and the case is referred to an auditor who makes a finding for the plaintiff, if the plaintiff moves under Rule 31 of the Superior Court for the entry of judgment on the auditor's report and the defendant opposes this motion and insists on his right to a trial by jury and there is nothing to show that the defendant may not produce at the trial evidence to controvert the auditor's report and overcome the finding of the auditor, the trial judge has no power to grant the plaintiff's motion for the entry of judgment.

In the case in which the point above stated was decided, it was *pointed out* that assent to the appointment of an auditor or a failure to object to such a reference is not a waiver of a claim for a trial by jury which already has been filed seasonably.

TWO ACTIONS OF CONTRACT, the first against the Lenox Motor Car Company, a corporation, for alleged breaches of contract in failing to accept and pay for work and materials furnished by

the plaintiff under four contracts in writing and two oral contracts, and the second by the same plaintiffs against Daniel S. Howard, Jr., and others upon a guaranty in writing of performance by the Lenox Motor Car Company of the contracts sued upon in the first action. Writ in the first case in Plymouth County dated November 17, 1916, and writ in the second case in Suffolk County dated July 1, 1915.

The defendants in both actions seasonably claimed a trial by jury. Thereafter by agreement the cases were referred to an auditor under Rule 31 of the Superior Court "to hear the parties, to examine their vouchers, to state the accounts and file his report thereon to the court." Thereafter the auditor filed "an elaborate report in each case dealing with all matters in issue covering respectively thirty-six and forty-one pages." He found for the plaintiffs in both cases, in the first case, against the Lenox Motor Car Company, in the sum of \$13,341.97, and in the second case, against Daniel S. Howard, Jr., and others, in the sum of \$10,000, which was the limit of the guaranty, with interest from the date of the writ.

The cases were heard together by Fox, J. The report of the judge contained the following statement: "The records do not show that the defendants in either case took any exceptions to rulings made by the auditor, or to either of the reports or moved to have either report recommitted or reviewed, other than "a contention that the plaintiffs had no right to recover against the guarantors until the liability of the Lenox Motor Car Company had been liquidated and that the action against the guarantors was brought prematurely.

The plaintiffs made a motion in each case under Rule 31 of the Superior Court for judgment to be entered according to the auditor's report. Thereupon the judge made in each case the ruling which is quoted in full in the opinion, and denied the motions. The judge, being of opinion that these interlocutory orders made by him ought to be determined by this court before any further proceedings in the Superior Court, with the consent of the parties reported the cases for such determination.

Lee M. Friedman, (*L. B. King* with him,) for the plaintiffs.

F. J. Muldoon, for the defendants. Captain *G. W. Reed*, who assisted in the preparation of the brief, was absent on military service at the time of the argument.

RUGG, C. J. These are actions at law sounding in contract. The defendants in each action seasonably claimed a trial by jury. Subsequently the cases were referred to an auditor, before whom a full hearing was had. His report was elaborate, covering in detail every issue. No exceptions were taken to rulings made by the auditor. St. 1914, c. 576, § 2. No motion was made to recommit and no objection was made except that questions of law were raised going to the root of the plaintiffs' claim in the Howard case. Thereupon the plaintiffs moved in each case for judgment to be entered according to the auditor's report. These motions were founded upon Rule 31 of the Superior Court, which, after regulating with some particularity proceedings before auditors, provides that "On the coming in of the auditor's report, either party may move for entry of judgment according to said report; and the court, thereupon, shall order such judgment to be entered, unless, within a time stated, cause appears or is shown to the contrary. If cause appears or is shown, the court may hear the parties and frame appropriate issues for the court or jury, upon which the trial shall be had." The following ruling was made upon these motions: "Upon the hearing of these motions it appeared that the defendants were not content with the findings of the auditor, and insisted upon their right of trial by jury, and thereupon I ruled as matter of law that I had not power to order judgment, but that in the exercise of my discretion I should order judgment in these cases if I had the power."

This ruling was correct. Article 15 of the Declaration of Rights of our Constitution is in these words: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it." It is manifest that the ordinary action of contract is a controversy concerning property, in which trial by jury commonly was had as of right at the time of the adoption of the Constitution. It was not one of those excepted causes in which it had theretofore "been otherways used and practised." *Stockbridge v. Mixer*, 215 Mass. 415. The case at bar in this respect is distinguishable

from *Ashley v. Three Justices of the Superior Court*, 228 Mass. 63, 73. It belongs to the class of cases, therefore, where under the Constitution trial by jury must be held sacred and jealously guarded against every encroachment. The power of the Superior Court is ample to make rules regulating practice and procedure, expediting the trial of causes and the general conduct of its business, and such rules are to be respected and enforced. R. L. c. 158, § 3. *Pratt v. Pratt*, 157 Mass. 503, 505. *Cram v. Moore*, 158 Mass. 276. *Norwood v. Dodge*, 215 Mass. 351. But of course such rules cannot override the Constitution.

The right to trial by jury may be regulated as to its method of claiming and mode of exercise in a large variety of aspects. The history of the changes in trial by jury since the Constitution is traced somewhat in *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 472, 473. The decisions there are reviewed and the statutes summarized. What there is said need not now be repeated. See also *Mead v. Culler*, 194 Mass. 277; *Commonwealth v. Gloucester*, 110 Mass. 491, 496; *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501, 506. Doubtless the power of regulation of the non-essential attributes of trial by jury has not been exhausted. Statutes, going further in this direction than any of our own, have been upheld in other jurisdictions. *Williams v. Gottschalk*, 231 Ill. 175. *Morrison Hotel & Restaurant Co. v. Kisner*, 245 Ill. 431. *Randall v. Kehler*, 60 Maine, 37. *Humphrey v. Eakeley*, 43 Vroom, 424. *Jones v. Spear*, 21 Vt. 426. *Smith v. Western Pacific Railway*, 203 N. Y. 499. No one of our statutes or decisions touches or impairs in any degree the substance of that right. The essence of that right is that controverted facts shall be decided by the jury. Each party must have on proper demand at least one fair opportunity to present to the jury the evidence which raises a disputed issue of fact.

The rule of court here in question must be interpreted in the light of these established principles. It cannot be presumed that the justices of the Superior Court in framing this rule intended to deny the right to trial by jury which underlies all our common law. It easily may be construed in harmony with that right. A sufficient "cause appears or is shown" why judgment should not be entered in accordance with the auditor's report as those words are used in the last sentence of the rule, if it is made manifest

that a trial by jury has been seasonably claimed by either party and is insisted on by such party, and there is a real issue of fact to be tried. Great preponderance of the apparent weight of testimony will not warrant a denial of trial by jury provided there is seemingly enough to require a submission of the case to the jury under the familiar principles.

By giving to the rule the interpretation urged by the plaintiffs the constitutional right of trial by jury would be denied by the portion of the rule here assailed. Instead of preserving trial by jury as a fixed right, it would be made to depend upon the discretion of the judge. A rule of that tenor would not recognize nor hold sacred an absolute right.

Doubtless it would be within the province of the court under the rule to require the parties to state the substance of the evidence which each expected to offer at the trial, and to ascertain whether there was upon such statement any disputed question of fact or any fact to be found either directly or by inference; and also in appropriate instances to frame questions, answers to which would settle such disputed fact or facts. Of course great care must be exercised in the use of this power and the fullest opportunity given to parties to make a complete statement with the knowledge that it is to be made the basis of a ruling of law upon the rights of the parties. But there is no fundamental objection to a ruling of law made upon a fair statement of what the evidence is expected to be. In reason there is no distinction between a rule of this nature and the well recognized practice of this court in appropriate cases of permitting a ruling to be made on the footing that on the opening statement of counsel to the jury no case is shown in law. *Hey v. Prime*, 197 Mass. 474. *Lee v. Blodget*, 214 Mass. 374, 377. *Stevens v. Nichols*, 155 Mass. 472. This rule prevails generally. *Oscanyan v. Arms Co.* 103 U. S. 261, 263, 264. *Butler v. National Home for Disabled Volunteer Soldiers*, 144 U. S. 64. *Carr v. Delaware, Lackawanna & Western Railroad*, 49 Vroom, 692. *Jordan v. Reed*, 48 Vroom, 584. *Barto v. Detroit Iron & Steel Co.* 155 Mich. 94. *Hoffman House v. Foote*, 172 N. Y. 348. *Hutton v. Stewart*, 90 Kans. 602. *Cornell v. Morrison*, 87 Ohio St. 215. *St. Paul Motor Vehicle Co. v. Johnston*, 127 Minn. 443. See also *Lane v. Portland Railway, Light & Power Co.* 58 Ore. 364; *James v. Pearson*, 64 Wash. 263.

But it is not the rule in England and some of the States. *Fletcher v. London & North Western Railway*, [1892] 1 Q. B. 122. *Pietsch v. Pietsch*, 245 Ill. 454, 458. *Haley v. Western Transit Co.* 76 Wis. 344. *Sullivan v. Williamson*, 21 Okla. 844. But it does not appear that this aspect of the rule was invoked in the case at bar, or that the judge based his refusal to order judgment upon any misconception of its force and effect in this particular.

The defendants in the cases at bar have not had their one fair opportunity for the presentation of their evidence to a jury. Therefore, their insistence upon that right cannot be denied them.

The plaintiffs argue with emphasis that oftentimes the sole object of filing a claim to a trial by jury is "a design to obstruct the adverse party's right to obtain justice in the courts 'promptly and without delay.'" *Stevens v. McDonald*, 173 Mass. 382, 384. This circumstance, even if it should be found to exist in some cases, would not warrant deviation from the plain rule of the Constitution.

The analogy to practice respecting the effect given to a master's report in equity does not warrant a departure from the express words of the Constitution respecting cases of law. Trial by jury has never existed as of right in equity, but is matter of sound judicial discretion. That branch of jurisprudence embraces, to quote the words of the Constitution as they were employed in 1780, "cases in which it has heretofore been otherways used and practised." *Parker v. Simpson*, 180 Mass. 334, 354. The finality of a master's findings of fact, when the evidence is not reported, rests upon that constitutional exception. The advantages which flow from that practice and the reasoning upon which a single trial of facts in equity is sustained, *Parker v. Nickerson*, 137 Mass. 487, 493, *Smith v. Lloyd*, 224 Mass. 173, afford no support to the validity of a construction of the rule of court now under discussion respecting an action at law, which would permit a judge to deny a trial by jury seasonably claimed as to disputed facts.

The record does not present a case where the defendants offer no evidence in opposition to an auditor's adverse report of unambiguous import, which is clothed by the statute with the force of *prima facie* evidence, and where a verdict should be directed in accordance with the finding. *Wakefield v. American Surety Co.* 209 Mass. 173, and cases collected at page 176. The cases at bar

had not reached that stage. It does not appear but that the defendants intend to produce at the trial evidence tending to overcome the case against them shown by the report of the auditor.

The record also is not analogous to the case where, at the conclusion of a trial, there appears to be no substantial evidence, or at most a mere scintilla, and where therefore a verdict may be directed. *Sprow v. Boston & Albany Railroad*, 163 Mass. 330, 341. *Shea v. Wellington*, 163 Mass. 364, 372. *Rainger v. Boston Mutual Life Association*, 167 Mass. 109, 110. *Denny v. Williams*, 5 Allen, 1, 5. *Butterfield v. Western Railroad*, 10 Allen, 532, 533. *Hillyer v. Dickinson*, 154 Mass. 502, 504. *Niland v. Boston Elevated Railway*, 208 Mass. 476. The cases had not progressed to the point where this could be determined.

The defendants have not waived their right to a trial by jury. Assent to the reference to the auditor, or failure to object to such reference, is not equivalent to a surrender of the claim for a jury trial which already had been filed seasonably. If the rule had expressly provided that such conduct should constitute a waiver, a different question might be presented. Reference to an auditor is an ancient, well recognized and increasingly important step in the disposition of a case. *Carpenter & Sons Co. v. New York, New Haven, & Hartford Railroad*, 184 Mass. 98. Assent by a party to such reference would not ordinarily work a waiver of other rights not inconsistent therewith. A constitutional right of the importance of trial by jury commonly would not be held to be lost by an implication of that character.

It does not seem to us that there is anything inconsistent with this conclusion in the decision of *Simmons v. Morrison*, 13 App. Cas. (D. C.) 161, rightly interpreted; but, if there is, we are not disposed to follow it.

Orders denying motion affirmed.

INHABITANTS OF BROOKLINE vs. RENTON WHIDDEN.

SAME vs. ATHERTON LORING.

Norfolk. November 22, 23, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Way, Private. Municipal Corporations. Equity Jurisdiction, Mandatory injunction.

Where a private way fifty feet wide, leading from a public street to a pond, belongs, as an easement granted by deed, to the owner of certain land, if the superintendent of streets of the town in which it lies, acting under Gen. Sts. c. 43, § 83, (now R. L. c. 48, § 99,) for the public safety and to protect the town from liability for injuries, because a traveller has been drowned in the pond, places a barrier across the entrance to the way, thus preventing its use with vehicles, although leaving it accessible to pedestrians, and the barrier is maintained for many years, this does not affect the existence of the easement, and, if twenty-seven years after the erection of the barrier the town acquires by purchase and conveyance the land to which the right of way is appurtenant, the town acquires the right to use the private way over its full width for vehicles as well as for travellers on foot.

Where a town as the owner of certain land owns as appurtenant to it an easement of the right to use a private way fifty feet wide, and brings a suit in equity for a mandatory injunction to compel the removal of a substantial brick wall built nineteen feet into such private way, it is no defence, that the superintendent of streets of the plaintiff and a member of the board of selectmen having in charge the highway district that includes the right of way, at the request of the defendant and at the cost of the town, placed curbing on an intersecting street extending across into the private way owned by the town to the same extent as the defendant's wall and that the superintendent of streets, when asked by a contractor employed by the defendant whether he could lay a granolithic sidewalk over this nineteen foot projection into the private way, answered, "Yes," because these acts did not constitute a license by the town to interfere with the easement owned by it, which could not be relinquished nor extinguished by an act of any town officer not authorized by the town.

In a like suit brought by the same town against another defendant for obstructing the same private way by erecting a building extending into it, it was held that for the same reason it was no defence, that the defendant had obtained the usual permits for constructing his building and had told the clerks or officials of the town that he proposed to put it "in any position he wanted to on the street" and had some general talk with the town engineer and one of the selectmen.

In the same cases it was held that the defendants, having been aware of the existence of the indenture that created the right of way owned by the town and having been advised in a general way as to the state of their record title with

reference to the easements in the private way when they built their obstructions, must be taken to have made these expenditures without excuse and under no misapprehension; and that, there being no suggestion that prompt action had not been taken when the matter came to the attention of the proper officers of the town, mandatory injunctions should issue ordering the defendants to remove the obstructions.

TWO BILLS IN EQUITY, filed in the Superior Court on January 29, 1914, by the town of Brookline against the owners of lots abutting on a private way or street called Essex Street constituting an extension of the public highway of that name in the part of Brookline called Longwood, the first suit, against the defendant Whidden, being brought to compel the removal of a brick wall extending into such private way, and the second suit, against the defendant Loring, being brought to compel the removal of a portion of a building of that defendant extending into such private way.

The two cases were referred separately to the same master, who heard the cases together and made a single report covering them both. Later the cases were heard upon the master's report by *Callahan, J.* The judge made a separate memorandum of findings in each case.

In the suit against Whidden his memorandum, after the introductory statement, was as follows:

"I rule that the plaintiff acquired by grant a right of way in that portion of Essex Street occupied by the defendant's wall, and that the easement was never completely extinguished by abandonment, or otherwise.

"But, while I rule there was no sufficient evidence to warrant a finding that the plaintiff granted a license to the defendant to erect the wall, I also rule that the plaintiff, knowing that the defendant had in fact erected the wall, granted him an implied license to maintain the obstruction caused by it, by reason of its extension of the Ivy Street curbing into Essex Street in acquiescent harmony with the impeding structure. . . . I further find and rule that by continuing to maintain the obstruction and by developing the land on Essex Street back of it by grading and by planting it with shrubs and vines, the defendant completely executed the license granted to him by the plaintiff.

"I, therefore, rule that the easement has been so modified by

the conduct of the parties as to extinguish it so far as it is obstructed by the wall complained of.

"In my opinion the bill should be dismissed, with costs."

In the suit against Loring the memorandum, after the introductory statement, was as follows:

"I rule, that the plaintiff acquired by grant a right of way in that portion of Essex Street occupied by the defendant's building; that the easement was never extinguished by abandonment, or otherwise, and that, as to this defendant, it was never modified or diminished by waiver, executed oral license, or otherwise.

"I find as facts by inference that the building constitutes a substantial obstruction of the plaintiff's right of way and that the building was constructed by the defendant, not inadvertently, but with notice that the successors in title of Sears and Francis, or some of them, were likely to assert their interest in the dominant estate and to contest an invasion of their right.

"The plaintiff is entitled to a decree ordering the defendant to remove such portion of his building as extends beyond the westerly line of Essex Street and enjoining him from further obstructing, or causing to be obstructed, any portion of such street abutting his land."

Later by order of the judge final decrees were entered dismissing the bill against the defendant Whidden with costs to that defendant and, in the suit against Loring, ordering that defendant to remove such portion of his building described in the bill as extended beyond the westerly line of Essex Street and enjoining him from further obstructing or causing to be obstructed any portion of that street abutting upon his land, and ordering him to pay costs to the plaintiff.

In the suit against Whidden the town of Brookline appealed and in the suit against Loring that defendant appealed.

W. D. Turner, for the town of Brookline.

A. Lincoln, for the defendant Loring.

T. Hunt, for the defendant Whidden.

RUGG, C. J. These are suits in equity whereby the plaintiff seeks to have removed obstructions placed by each of the defendants in a private way known as Essex Street in the town of Brookline. The plaintiff, as grantee in deeds of two parcels of land, one called the Amory Playground and the other Mason

Square, asserts proprietary ownership of rights of way in Essex Street. The cases were referred to a master, whose findings of fact must be accepted as true since there is no report of the evidence.

Summarily stated, the material circumstances are that in 1827, by indenture duly executed and recorded, Ebenezer Francis and David Sears, being owners of large tracts of adjoining land, laid out along their boundary line a new road fifty feet wide, each contributing one half the required land. The description of the way, thrice repeated in the indenture, was that it extended from Brighton Road "southerly about one hundred and fifty rods until it comes to the pond." The recital in the indenture is that the way is for the mutual benefit and common use of Sears and of Francis as owners of tracts of land (including the several parcels owned by the parties hereto), and their respective heirs and assigns, and of all persons going to or from their respective tracts of land or any part thereof. This new way, known as Essex Street, was shown as extending to and beyond the pond in a series of published or recorded plans by different civil engineers between 1849 and 1885. That part of Essex Street between Brighton Road and Ivy Street became a public highway and respecting that no question now is raised. The controversy centres about that portion extending southerly from Ivy Street and beyond the pond. The estates of the defendants are on the southerly side of Ivy Street on opposite corners of Essex Street. This portion of Essex Street extending southerly from Ivy Street was a well defined, ordinary country road, and long before the ownership of the parties to the present suit, had been put in a condition safe for travel for persons and vehicles. It was open and dedicated to public use. At or near the pond it joined Freeman Street. On one side Essex Street was marked by a high hedge, along which next to the street was a well defined raised walkway suitable for use by pedestrians; on a part of the other side was a fence of stone posts and iron chains. The shore line of the pond was not immovable, but varied somewhat in location by reason of swamp, drainage, wet and dry seasons, filling, and perhaps other causes. The street was used by people both on foot and in vehicles until 1876, when the superintendent of streets of the town, because a traveller had been drowned in the pond, placed a barrier at or near Ivy Street,

effectually preventing vehicles from entering Essex Street, but not seriously obstructing travel on foot. Thereafter vehicles did not use that portion of Essex Street, but it continued to be used at all times by pedestrians resorting to the pond or its shores or near by land for sports or picnicking. Freeman Street to its junction with Essex Street at the pond also was open and used as a private way for a considerable traffic by vehicles from about 1858 to 1876. In 1890 the officers of the town granted a license for the erection of electric light poles in the street, which were placed in accordance therewith.

The town has no right in its governmental capacity to the locus of the street, but it has rights as a municipal corporation owning land abutting on the street. Those rights arise from its purchase in 1903 of a tract of land for use as a public playground bounded on Freeman Street and on its junction with Essex Street and on Essex Street as and if extended southerly from such junction. The premises were conveyed with the right "so far as the grantors have the power to grant the same, to use said Freeman Street and Essex Street for all purposes for which public ways are commonly used in said Town" and subject to the agreement of 1827 between Francis and Sears. This land was owned at the time of the indenture in 1827 by Sears. A part of it was conveyed by Sears to his daughter in 1845 and it bounded on a line corresponding to the centre line of Essex Street as laid out in the indenture of 1827 as if extended across the pond southerly to Beacon Street. The remainder was devised to his daughter by will, proved in 1871, by a description bounding on Freeman Street and Essex Street and their intersection. Both these tracts were conveyed by the heirs of the daughter in 1903 to the grantors in the deed to the town "with the benefit of and subject to such rights and easements as may now be in force respecting the laying out and use of a street fifty feet wide called Essex Street along the easterly side of the granted premises." By will Sears gave the "fee of the streets and squares I have laid out and opened on my estate" to his children and their issue "in trust that the same shall be kept open forever for ornament and use as streets and squares only and for the benefit of all residents . . . contiguous to said streets and squares. . . ."

The report of the master appears fairly susceptible of the con-

struction that he finds that the right to use Essex Street as created by the indenture of 1827 attached as an easement to the land included within the purchase by the town for the playground. It appears to have been contiguous at one corner. But, however that may be, from the facts found by him it is plain that it was the intention of the parties to the indenture that the easement thereby created should be appurtenant not alone to adjacent lands but to the "several parcels owned by the parties thereto." *Graham v. Walker*, 78 Conn. 130. *Boland v. St. John's Schools*, 163 Mass. 229. It follows as matter of law that an easement to use the way laid out by the indenture of 1827 was created and used, and that that easement passed by grant as appurtenant to the playground land when purchased by the town. The easement was created by written instrument, recorded in the registry of deeds. It was defined thereby. It was declared to be for the benefit of the owner of this parcel of land among others. By its record all the world was given notice of the way and of the persons for whose benefit it was established. The way physically was made manifest on the face of the earth. It was used for travel of all kinds without question for many years before 1876. The easement was co-extensive with the way as laid out and attached to its full width of fifty feet. *Fox v. Union Sugar Refinery*, 109 Mass. 292. Essex Street is referred to by name as being a boundary of that portion of the playground lot devised by Sears to his daughter in 1871. The easement passed by grant to the town. *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145. *Burnham v. Mahoney*, 222 Mass. 524. *Ralph v. Clifford*, 224 Mass. 58, 60. *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402. The town could acquire such easement by grant as well as by prescription or reservation. *Commonwealth v. Low*, 3 Pick. 408.

It is contended that the easement of the town has been extinguished. That contention is grounded in part upon the action of the superintendent of streets of the town, either of his own motion or by direction of the selectmen, in placing a barrier across the entrance to Essex Street from Ivy Street in 1876 and maintaining it for many years thereafter. At that time the playground lot was in private ownership, the town not acquiring its title by deed until 1903. The closing of the entrance was therefore the act of a public officer in the exercise of governmental functions.

It was not the conduct of a private proprietor. It was done because of an accident to a traveller in the pond. Authority was conferred by Gen. Sts. c. 43, § 83 (now R. L. c. 48, § 99), upon selectmen, whenever demanded by the public safety, to cause the entrances of private ways entering upon and uniting with public highways to be closed. If this was not done, the town was liable for damages arising from defects as if it were a public way. This act of the superintendent of streets did not affect as matter of law the private rights in the way. As matter of fact, according to the findings of the master, it did not seriously interrupt the use of the way by travellers on foot. It simply prevented vehicles from going upon it. But it did not extinguish private easements. Its design merely was to protect the municipality from liability to actions for damages. The easements in Essex Street were valuable property rights. They could not be destroyed or expropriated by public authority without compensation. The statute under which alone the town officers had a right to erect the barrier makes no provision for the payment of damages. The initial erection of the barrier grew out of the desire and right to protect the town in its governmental capacity from actions for damages for injuries received by travellers on the dangerous private way. The continued maintenance by its appropriate public officer after the purchase by the town of the playground lot was presumably for the same purpose. The easement acquired by the town by grant has not been affected. It was at most merely suspended as to the entrance of vehicles from or into Ivy Street while the barrier was maintained. The case at bar is distinguishable from *Central Wharf v. India Wharf*, 123 Mass. 567, and like cases where by exercise of the power of eminent domain the enjoyment of an easement has become impossible. The barrier might have been taken down at any time. The danger to the public might have been removed by the owners of the easement or of the fee, or perhaps otherwise, and no occasion remain for the further maintenance of the barrier.

There has been no abandonment of the easement. It was used all the while by pedestrians without substantial interruption. It was only the use by vehicles which was suspended. Mere non-user, even if complete and continued, does not necessarily defeat an easement. *Willets v. Langhaar*, 212 Mass. 573. *Parsons v.*

New York, New Haven, & Hartford Railroad, 216 Mass. 269.
Boston & Albany Railroad v. Reardon, 226 Mass. 286, 292.

The fact is undisputed that each of the defendants has placed obstructions of a permanent character within the limits of the way. But it is contended that this was by virtue of a license by the town executed by the defendants and hence irrevocable. Doubtless a general parol license by the owner of the dominant tenement to obstruct an easement, when executed by the owner of the servient tenement upon his own land, becomes irrevocable. The easement is then to that extent modified. *Boston & Providence Railroad v. Doherty*, 154 Mass. 314, 317. The facts upon which this principle is invoked are that the defendant Whidden built a substantial wall nineteen feet into the limits of Essex Street, and that thereafter "the town by direction of the superintendent of streets, and a member of the board of selectmen having in charge the particular highway district in question, at the request of said Whidden, and at the cost of the town, placed curbing on said Ivy Street . . ." extending across and into Essex Street to the same extent as the wall with the usual curve in the curbing as it rounded in and on Essex Street, and that the superintendent of streets, when asked by a contractor employed by the defendant Whidden if he could lay a granolithic sidewalk over this nineteen foot projection into Essex Street, replied, "Yes." The defendant Whidden also graded his lot and planted shrubs and vines substantially over this space for a considerable distance down Essex Street. This finding by the master as matter of construction does not mean that the town in its corporate capacity with due formality voted that these things might be done. It simply means that the curbing was laid by direction of the superintendent of streets and the single selectman and the expense paid out of the town treasury. The laying of the curbing was not done by Whidden, but by two town officers at his request. That did not constitute a license by the town to interfere with the easement owned by it. Property rights of a municipality cannot be so lightly surrendered. The town was the owner of the easement by grant. That was a right in real estate. It could not be relinquished or extinguished by the unauthorized act of any town officer. *Franklin Savings Bank v. Framingham*, 212 Mass. 92, and cases collected at page 95. A selectman and superintendent of

streets cannot be presumed to have any authority respecting an easement of travel owned by a town as appurtenant to land purchased for a playground. There was no vote of the town conferring authority upon any officer to extinguish or modify the easement. The case at bar bears no resemblance to *Canny v. Andrews*, 123 Mass. 155, where an easement in connection with the use of a chimney was held to be abandoned when the city had purchased the dominant estate with a building on it for the purpose of widening a street, and in execution of that purpose had taken down the building, thereby rendering the building on the servient tenement to which the chimney was attached unfit for occupation, and appropriated the greater part of the lot to the widening of the street and allowed the small remnant of the lot to lie idle for six years before selling it. There the laying out of the street, which, by its inevitable consequence, wrought the abandonment of the easement, was an authorized act of public authority.

The defendant Loring asserts an executed license from the circumstances before narrated as to the defendant Whidden, and from the fact that he procured the usual permits for constructing his building, and told the clerks or officials of the town that he proposed to put it "in any position he wanted to on the street" and had some general talk with the town engineer and one of the selectmen. Manifestly he is not protected by any license for reasons already stated.

The defendants severally were aware of the existence of the indenture of 1827 and were advised in a general way as to the state of their record title with reference to the easements in Essex Street when they built their obstructions. They had no right to narrow the way by encroachments. *Welch v. Wilcox*, 101 Mass. 162. They must be held in substance and effect to have made these expenditures without excuse and under no misapprehension. There is no estoppel which prevents the town from exercising its rights. There is no suggestion that prompt action was not taken when the matter came to the attention of the proper officers of the town. The cases at bar come within the authority of numerous decisions where a mandatory injunction has been issued ordering defendants to remove the obstructions. The principles which govern courts of equity have been amplified frequently and need not be repeated. *Curtis Manuf. Co. v. Spencer Wire Co.* 203 Mass.

448, and cases collected. *Kershishian v. Johnson*, 210 Mass. 135, 139. *Szathmary v. Boston & Albany Railroad*, 214 Mass. 42. *Stevens v. Rockport Granite Co.* 216 Mass. 486, 493.

The decree in the Loring case was right and is affirmed with costs. The decree in the Whidden case was erroneous. It is reversed. A new decree is to be entered directing him to remove the obstructions placed by him upon Essex Street and enjoining him from further obstructing it, with costs to the plaintiff.

Ordered accordingly.



COLLECTOR OF TAXES OF BOSTON *vs.* RISING SUN STREET
LIGHTING COMPANY.

Suffolk. December 5, 1917. — February 28, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On personal property of foreign corporation. Corporation, Foreign: taxation. Constitutional Law.

A corporation organized under the laws of another State, which has a contract to furnish a city in this Commonwealth with fire alarm lamps and with "boulevard lanterns, burners, domes and incandescent mantles" for the lighting of public streets, parks and other public places, retaining its ownership in all the lamps and placing them on posts owned by the city, and which, for the purpose of performing its contract, hires an office in the city and places in it its own office furniture and owns also horses, wagons, carriages, sleighs and harnesses used in carrying out its lighting contract with the city, is liable to taxation upon all this property under St. 1909, c. 516, § 2, and St. 1909, c. 490, Part I, § 23, cl. 1, and, if it fails to pay such tax when regularly assessed to it, the collector of taxes of the city can maintain an action of contract against such foreign corporation for the amount of such tax.

There is nothing in the statutes that authorize the collection of such a tax from a foreign corporation which violates any provision of the Fourteenth Amendment of the Constitution of the United States.

When a foreign corporation comes into this Commonwealth to transact a local or intrastate business, it assents to be bound by our laws respecting such corporations, including the laws relating to taxation so far as they are valid.

CONTRACT by the collector of taxes of the city of Boston against the Rising Sun Street Lighting Company, a corporation organized under the laws of the State of Maine, to recover the amount of a tax on personal property of the defendant in Boston assessed to

the defendant for the year 1912 with interest and costs, amounting in all to \$1,162. Writ dated January 16, 1913.

In the Superior Court the case was heard by *Hamilton, J.*, upon an agreed statement of facts as stated in substance in the opinion. The judge found for the plaintiff and assessed damages in the sum of \$1,439.05. The defendant appealed.

The case was submitted on briefs.

C. H. Innes & W. Turtle, for the defendant.

W. J. O'Malley, for the plaintiff.

RUGG, C. J. This is an action of contract by the collector of taxes of the city of Boston to recover taxes assessed against the defendant, a foreign corporation organized under the laws of Maine, upon personal property owned by it and physically in Boston during the entire year 1912, for which the tax was assessed. The defendant by virtue of a contract with the city of Boston furnished it with fire alarm lamps and with "boulevard lanterns, burners, domes and incandescent mantles" for the lighting of public streets, parks, and other public places, all of which were owned by the defendant and placed on lamp posts owned by the city. The defendant also furnished the gas consumed in them. It rented a building for storage, for making repairs and renewals, where also it kept needed tools and appliances owned by it. It also hired an office equipped with its own office furniture. It owned four horses, three wagons, three carriages, two sleighs, and four harnesses. All this personal property was necessary and used for carrying out its lighting contract with the city. The tax was levied upon all this property.

This property was taxable in its nature. It is included within the descriptive words of St. 1909, c. 516, § 2, which subjects to taxation "merchandise, machinery, and animals owned . . . by foreign corporations and not" taxed under another provision of the law, and requires that it be "assessed to the owner in the city or town" where situated. It is also comprehended within "goods, wares, merchandise" of St. 1909, c. 490, Part I, § 23, cl. 1, which when owned by a foreign corporation "shall be assessed in the city or town where it is situated." *New England & Savannah Steamship Co. v. Commonwealth*, 195 Mass. 385. *Tobey v. Kip*, 214 Mass. 477. *Basset v. Boston*, 226 Mass. 64, 66. *Sullivan v. Ashfield*, 227 Mass. 24, 28.

The property was not devoted to a public use in such sense as to be exempt from taxation. It was privately owned. It could be removed and used for other purposes. Other property could have been substituted for it. It is manifest that horses, vehicles and tools were wholly separate from the property set upon the lighting posts of the city of Boston, and were not irrevocably dedicated to a public use. It has been decided by several adjudications that the lighting of streets as ordinarily undertaken by cities and towns in the absence of some compelling statute is not a public function but is partly at least for the protection of the private interests of the municipality. *Dickinson v. Boston*, 188 Mass. 595, 598. *Sullivan v. Holyoke*, 135 Mass. 273. *Haley v. Boston*, 191 Mass. 291, 293. *Bolster v. Lawrence*, 225 Mass. 387, 390. Therefore, the rule of exoneration from taxation of property devoted to a strictly public use illustrated by *Milford Water Co. v. Hopkinton*, 192 Mass. 491, has no relevancy to the present facts.

But the defendant, being a foreign corporation, contends that it is protected from a personal action against it for taxes by the provisions of the Fourteenth Amendment to the Federal Constitution on the ground that the establishment of personal liability would be the taking of its property without due process of law.

No contention is made that the tax is not just in amount (provided the defendant is subject to taxation), or that all formalities of the law as to assessment have not been observed.

The maintenance of a personal action for the collection of the tax in the name of the collector of taxes against the defendant as the person assessed is authorized by the express terms of St. 1909, c. 490, Part II, §§ 33, 34. That has been a part of our law for more than a century. *Rogers v. Gookin*, 198 Mass. 434. *Harrington v. Glidden*, 179 Mass. 486, 494. That must have been the law when the defendant was admitted to do business in Massachusetts. In the contract signed by the defendant with the city of Boston occurs this: "The full names and residences of all the persons interested in this contract as principals are as follows: Rising Sun Street Lighting Company, Boston, Mass., Peter J. Fitzgerald, President and General Manager, Robt. J. Gove, Treasurer. . . . The corporation is of the State of Maine." The defendant maintained an office in the city of Boston as well as its workshop and storehouse, and conducted its business there.

It may be presumed that it had complied with the provisions of our statutes, both as to the appointment of agents for the service of process and otherwise, so that it was authorized to do business here. *Doherty v. Ayer*, 197 Mass. 241, 248. *Cincinnati, New Orleans & Texas Pacific Railway v. Rankin*, 241 U. S. 319, 327. No question is made as to the sufficiency of the service in the case at bar. Manifestly the defendant was transacting a purely local and domestic business of considerable magnitude. It was in no sense an interstate business, but was wholly intrastate in its nature.

It is a fundamental principle governing the respective rights of the several States of the Union and of foreign corporations organized under the laws of other States to do intrastate business that the States have the absolute power wholly to exclude such corporations or to grant to them the power to transact local business within their borders upon such terms and conditions as may be specified. In *Paul v. Virginia*, 8 Wall. 168, at page 181, it was said respecting corporations, "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely. . . . The whole matter rests in their discretion." These words were quoted with approval in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, at page 314, with this comment: "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest." But it further was said (page 315): "Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient." This is the doctrine of the latest cases. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 343. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, and cases cited at page 83. "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce,

interstate or foreign." *McCall v. California*, 136 U. S. 104, 112. Doubtless there are other limitations such as that the foreign corporations may not be prohibited from resort to the federal courts in proper instances, nor required to part with their property without due process of law, nor submit to the impairment of their contracts nor submit as between themselves to unequal laws. But what may be the further limitations need not be examined, because they are not germane to the question here at issue.

There is nothing inherently vicious in the collection of a valid property tax by a personal action at law. That has been settled by a long line of our own decisions. *Boston v. Turner*, 201 Mass. 190, and cases cited. *Glidden v. Harrington*, 189 U. S. 255. When the defendant came into this Commonwealth to transact a local or intrastate business, it assented to be bound by our laws respecting it. One of those laws was that under which this action is brought. Having accepted the benefits of our markets opened to it on that among other conditions, it cannot now complain. It has submitted itself to the jurisdiction of our laws as to taxation, and is bound by them, so far as they are valid.

The authorities upon which the defendant relies do not seem to us applicable to the facts here disclosed. *Dewey v. Des Moines*, 173 U. S. 193, held invalid a State law imposing upon a non-resident landowner personal liability for an assessment levied on his land for a local improvement. This decision was explained in *Bristol v. Washington County*, 177 U. S. 133, at page 146, to mean "that a citizen of one State cannot be cast in a personal judgment in another State on an assessment levied there on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction." It was held in this case that a tax assessed on the personal property of a non-resident might be proved as a claim against her estate after her death, and that the sole remedy was not against the property taxed. That decision seems to us an authority supporting the conclusion here reached. The defendant relies also upon *New York v. McLean*, 170 N. Y. 374. But that was not an assessment upon property employed in business by a non-resident owner, but upon stock held in a national bank by a non-resident owner.

Judgment affirmed.

EMELINE BRADFORD (afterwards JOHN B. NEWHALL, administrator of her estate,) *vs.* LILLA EASTMAN & others.

Essex. January 7, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Trust, Oral in personal property. *Equity Jurisdiction*, To enforce oral trust. *Savings Bank*. *Equity Pleading and Practice*, Master's report. *Evidence*, Competency.

Where a woman, who lived and had savings bank deposits in a city in this Commonwealth, when about to start for Nova Scotia on a visit, caused the savings bank deposits to be transferred to the joint names of herself and her niece, in order that her niece might draw sums of money and forward them to her while she was away, and made the transfer only when the niece agreed to return the bank books upon request, and where after the woman had returned from her visit she demanded the bank books and the niece refused to give them up, it was *held* that the woman who owned the deposits could maintain a suit in equity to enforce the oral trust in personal property by compelling the niece to deliver the bank books to her together with a proper assignment of them.

In a suit in equity certain exceptions to a master's report were founded on the alleged erroneous admission of evidence by the master, but it appeared by the report that the master reached his conclusions apart from this evidence, and it was *held* that the exceptions were immaterial and need not be considered.

In the case described above in regard to enforcing an oral trust in certain savings bank deposits, it was *stated* that the testimony of the plaintiff, that in the presence of the defendant she told the officers of the savings banks that she wanted the deposits put in the joint names of herself and the defendant so that she could draw money when she "went down East," plainly was admissible.

BILL IN EQUITY, filed in the Superior Court on September 2, 1916, by Emeline Bradford of Lynn, and afterwards allowed to be prosecuted by the administrator of her estate, to compel the defendant Lilla Eastman to transfer and turn over to the plaintiff certain deposits belonging to Emeline Bradford and her estate in the Lynn Institution for Savings, the Commonwealth Savings Bank of Lynn and the Salem Savings Bank, these three banks also being made defendants.

The case was referred to a master, who filed a report which contained the facts that are stated in the opinion. Later the case was heard by *Quinn, J.*, upon the exceptions of the defendant Eastman to the master's report. The judge made an order that the exceptions be overruled and that the report be confirmed, and that

a decree be entered ordering the defendant Eastman to deliver forthwith to the plaintiff the bank books issued by the three banks named as defendants, the plaintiff to have his costs against the defendant Eastman and the bill to be dismissed without costs as to the defendant savings banks.

Afterwards by order of the judge a final decree was entered in accordance with the judge's interlocutory order, and the defendant Eastman appealed.

S. H. Hollis, (*R. T. Parke* with him,) for the defendant Eastman.
H. R. Mayo, for the plaintiff.

DE COURCY, J. These are the facts, as found by the master. In December, 1914, Emeline Bradford, a widow seventy-two years of age, was planning to go to Nova Scotia to visit her sister, who was the defendant's mother. Her property consisted of three savings bank deposits, amounting to about \$2,500. She caused the deposits to be put in the names of herself and the defendant, and delivered possession of the deposit books to the defendant on the latter's promise to return them whenever so requested. It is expressly found that "the plaintiff's intention in delivering possession of the books to the defendant was to provide a convenient method, as she thought, of drawing on her bank accounts while out of the country, by having the defendant hold the books, draw sums and forward them to her as she required, and return the books to her when called for." She did not intend to make a gift of the books or of the money represented by them, and she would not have delivered the books to her niece but for the latter's promise to return them when requested.

Mrs. Bradford went to Nova Scotia in May, 1915, and remained there until January, 1916. She then returned to Lynn, and lived at the defendant's home for some months. On several occasions she demanded her bank books, but the defendant, in violation of her promise, refused to give them up. This suit was brought to get possession of them.

The defendant did not testify as a witness. Her contention is that by reason of the deposit books being made out in the joint names of her aunt and herself, and of the terms of the identification cards prepared by the banks when they issued the books, she became joint owner of the money with the real owner. It may be assumed that, as between the banks and these parties, the banks

would be justified in treating the deposits as funds in which the parties had a joint interest. But as between the plaintiff and defendant, the money belonged always and wholly to Mrs. Bradford, as the master has found. Whatever legal title Mrs. Eastman had in the books or money, she held in trust for her aunt. That trust in personal property could be established by parol, notwithstanding the form in which the books were made out. The defendant's possession of the bank books was merely that of an agent, under express obligation to return them to her principal on demand. Upon her refusal so to return them, and on the facts disclosed in the record, a court of equity was well warranted in ordering her to restore the bank books to their real owner. *Peck v. Scofield*, 186 Mass. 108. *Bailey v. Wood*, 211 Mass. 37. *Kerr v. Crane*, 212 Mass. 224. *Schmidt v. Schmidt*, 216 Mass. 572. *Woodard v. Woodard*, 216 Mass. 1. In *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, on which the defendant relies, it was found as a fact that in making the changes in the bank books and accounts Henry D. Williams intended to give and transfer to his sister, Mrs. Worthington, a joint interest in the same; while in the present case it is expressly found that no gift was intended.

This disposes of the exceptions to the master's report except the third and fourth, which relate to the admission of testimony. These need not be considered, as the master's certificate shows that he reached his conclusions of fact apart from this evidence. But it may be stated that the testimony of Mrs. Bradford, that she told the bank officers she wanted the money put in Mrs. Eastman's name and her own, "so she could draw it when I went down East," plainly was admissible, if for no other reason, because it was said in the presence of the defendant, who now seeks to claim the money as her own.

It appears that since the bringing of these proceedings Emeline Bradford has died, and that John B. Newhall, special administrator of her estate, has been admitted as a party to prosecute this suit. Accordingly the decree of the Superior Court must be modified, and a decree entered ordering the defendant to deliver to the present plaintiff the three deposit books, together with an assignment thereof.

Decree accordingly with costs.

JOHN DENNIS vs. CLYDE, NEW ENGLAND AND SOUTHERN LINES.

Suffolk. January 8, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability: dangerous and unsafe fellow servants. *Evidence*, Of incompetence of fellow employee.

The duty resting on an employer to guard against the employment of incompetent servants is the same, whether the incompetence arises from ignorance of the work to be done and physical or mental incapacity to perform it on the one hand, or on the other hand from an unbalanced mind or self indulgent appetites and vices. Per RUGG, C. J.

While such incompetence of an employee may be shown by evidence of a general reputation to that effect, evidence tending merely to show that an employee was addressed by a few of his fellow employees as "crazy" is not sufficient to warrant a finding of such a reputation.

While knowledge by an employer or by those acting for him of particular acts of an employee of such character or number as to show him to be a dangerous man with whom to work may tend to show negligence in failing to discharge him, evidence which tends merely to show that on one occasion a longshoreman, with the knowledge of a stevedore, who for his employer was in charge of him and his fellow employees, was asleep during working hours at the place of work by reason of drunkenness, that the longshoreman frequently drank whiskey during working hours, that on one occasion he had drawn a knife during an altercation with a fellow workman, which he did not use, the fellow workman running away, and that he had said to a second fellow workman that he would "fix" him, will not warrant a finding of such knowledge of the dangerous character of the workman as will render the employer liable in an action by the second fellow workman for personal injuries received by him when he afterwards was assaulted by the alleged dangerous workman.

TORT for personal injuries occasioned by an assault upon the plaintiff, while he was in the employ of the defendant, by a fellow employee whom, it was alleged, the defendant was negligent in employing and in keeping in his employ because his temperament, reputation and character rendered him unsafe and unfit to mingle and work with his fellow workmen. Writ dated April 30, 1915.

In the Superior Court the case was tried before J. F. Brown, J. The material evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. G. Andrews, (E. I. Smith with him,) for the plaintiff.

S. R. Jones, for the defendant.

RUGG, C. J. This is an action of tort to recover damages for injuries sustained by the plaintiff while a longshoreman in the employ of the defendant, who was not a subscriber under the workmen's compensation act, by reason of an assault committed upon him by a fellow workman named Banana. The ground of liability alleged is negligence on the part of the defendant in employing or continuing in employment the plaintiff's assailant, whose temperament, habits and characteristics known to the defendant rendered him incompetent, unsafe and dangerous as a fellow workman.

The evidence upon which it is sought to support this contention came entirely from the plaintiff, who testified that he "heard all the men call Banana crazy and that he is crazy, and that he heard two of his fellow employees, White and Taylor, call Banana crazy and some other fellows he could not remember. He heard Taylor call Banana crazy a good many times; every time he came around he would call him, 'Hello, crazy Banana.' He saw him drink a good many times around there when he was working; almost every time when he had a chance; 'quite a few times a day; the times I see, sometimes two, three days, and the others I can't say.' He saw him drink some stuff like whiskey from a half pint bottle; that he always used to have a half pint in his pocket. . . . 'One day we was working together in the hot house, and the stevedore come around and says, Where is Banana? I says, he was in there between that freight lying, and he is going out there and he saw him lying asleep, he is drunk, he is so drunk he can't work, and he started to laugh at him.' This was about a week before the accident;" that the stevedore, Melzer by name, in charge of the defendant's longshoremen, knew about Banana's crazy and drunken actions; that a few days before the plaintiff's injury he saw Banana and a Polish man having "an argument and fighting words." They were fighting only two or three minutes and "I saw the Banana pull a knife and Pollock run away." The plaintiff reported this affair to Melzer, who told him to go to work and he would see Banana about it. Later in the same day Banana said to the plaintiff, "You tell Bob (Melzer) about I pull a knife to a Pollock, but I going to fix you." When these words

were repeated to Melzer, he told the plaintiff "to mind his own business." Taylor told the plaintiff that "Banana was crazy on the day before he saw him sleeping on the potatoes," saying, "Look out for this fellow, he is crazy, he is drunk." The plaintiff thought Banana was crazy all the time they were working together, but "he never told Melzer that Banana was crazy; that the only reason why he thought Banana was crazy was this that Mr. Taylor told him, and because he saw him drunk the day he pointed him out to Mr. Melzer," and that on one occasion he thought Banana and Melzer drank together although he did not see them. These acts were all that the plaintiff according to his testimony had seen "Banana do out of the ordinary before" the assault was committed. There was ample testimony from various witnesses to the effect that Banana was a peaceful and inoffensive man, and contradicting all the significant testimony of the plaintiff, but this need not be considered in this connection, as it must be assumed that the plaintiff's testimony might be believed.

The principles of law which govern a case of this sort are settled. An employer is bound to the exercise of due care in hiring men who are reasonably safe companions in labor, whose disposition, temper and self restraint are such that they will not be dangerous to their fellows, and who are sufficiently stable in mind and temperate in habits to be harmless under the common irritations of daily work. Ordinary precaution in this regard must be used, not only in the initial employment but also in observance of conduct after the relation of master and servant has been established, in order to ascertain that the employee may not become a menace to the safety of those about him. The duty resting on the employer to guard against the employment of incompetent servants is the same whether incompetence arises from ignorance of the work to be done and physical or mental incapacity to perform it on the one hand, or on the other hand from an unbalanced mind or self indulgent appetites and vices. *Gilman v. Eastern Railroad*, 13 Allen, 433, 441. *Connors v. Morton*, 160 Mass. 333, 335. *Beers v. Isaac Prouty Co.* 200 Mass. 19. *Guilfoil v. Everett*, 214 Mass. 571. Incompetence of an employee may be shown by evidence of a general reputation to that effect. *Hatt v. Nay*, 144 Mass. 186. *Leary v. William G. Webber Co.* 210 Mass. 68, 73. Single instances of inefficiency by an individual are not admissible

to prove incompetency. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 14. But knowledge by the employer, or of those acting for him, of particular acts by an employee of such character or number as to show him to be a dangerous man with whom to work, may tend to show negligence in failing to discharge him.

The evidence fails to show a general reputation that the plaintiff's fellow workman and assailant was insane or of a quarrelsome disposition. It appears that he was addressed by a few of his co-laborers as "crazy Banana." That seems to have been the nickname applied to him by three or four men working with him. Its use in speaking to him hardly warrants the conclusion that it constituted a conviction on their part that he was of unsound mind. Moreover, even if that were to be stretched so far as to be regarded as an expression of opinion by the few who used the sobriquet, it would not amount to a general reputation. *Driscoll v. Fall River*, 163 Mass. 105, 107.

The specific facts as to the plaintiff's assailant brought home to the knowledge of the defendant's foreman were in substance four: (1) he was once asleep by reason of drunkenness "at the place of work," (2) he occasionally, perhaps frequently, drank whiskey during working hours, (3) on one occasion he had drawn a knife during an altercation with a fellow workman, but did not use it and the latter ran away, and (4) he had said to the plaintiff that he would "fix" him. Whatever else may be said respecting these facts as to the use of liquor, they do not tend to show that the man was dangerous in this kind of work, or was of unbalanced mind so as to make him dangerous. The drawing of the knife was during a heated controversy with another man. It does not appear who was the aggressor, nor how it happened to be drawn, nor that any attempt was made to use it. No harm resulted. It was made the subject of conference in which apparently Banana satisfied Melzer of his good intentions. The threat to the plaintiff was not in connection with the common employment. It pointed in the direction of a personal ill will and vindictiveness disconnected with work, which well might have been aggravated rather than tranquilized by a discharge or reproof, the only courses of action open to the defendant.

Exceptions overruled.

CAROLINE E. WALL, executrix, *vs.* MASSACHUSETTS NORTH-
EASTERN STREET RAILWAY COMPANY.

Essex. January 8, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Causing death. Death. Release. Executor and Administrator.

If one, who has suffered an injury by reason of the negligence of a street railway corporation, executes and delivers to the corporation a release, stating that it is binding upon his heirs, executors, administrators and assigns, discharging the corporation "from any and all claims, demands, action and causes of action, of every name and nature, that I have or might have against" it "as the result of all injuries, either personal or property, sustained by me on . . . [naming the date]", such release, in case of the subsequent death of the injured person, does not bar an action brought by the executor of his will under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, c. 392, § 1; 1911, c. 635; 1912, c. 354, to enforce the penalty for causing his death by the negligent act that caused the injury specified in the release.

TORT by the executrix of the will of Rosa A. Arnold, with a declaration in two counts, the first for causing conscious suffering, and the second for causing the death, of the plaintiff's testatrix through negligence. Writ dated July 22, 1916.

In the Superior Court the case was tried before *Sanderson, J.*, the defendant relying on the release described in the opinion. At the close of the evidence, it was agreed that the release was a bar to the cause of action set out in the first count. The judge ruled that it also was a bar to the action set out in the second count, ordered a verdict for the defendant and reported the case for determination by this court, it being agreed that, if the ruling was erroneous, judgment was to be entered for the plaintiff in the sum of \$1,500; but, if the ruling was correct, judgment was to be entered for the defendant.

J. J. Ryan & J. T. Fitzgerald, for the defendant, submitted a brief.

A. Withington, for the plaintiff.

BY THE COURT. This is an action of tort under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, c. 392, § 1; 1911, c. 635;

1912, c. 354, in two counts; one for conscious suffering and the other for death of Rosa A. Arnold, while a passenger of the defendant in the exercise of due care, caused by the negligence of the servants of the defendant.

During her life the deceased executed a release under seal discharging the defendant "from any and all claims, demands, action and causes of action, of every name and nature, that I have or might have against said company as the result of all injuries, either personal or property, sustained by me on or about the 30th day of December, 1915. This release is not to be construed as an admission of liability on the part of said company, and is to be binding upon me, my heirs, executors, administrators and assigns." Of course the plaintiff cannot recover under her first count: the only question relates to the second count.

The action for death did not accrue to the deceased during her life. It is a penalty imposed for her death. It is a cause of action over which the deceased has no control. It does not accrue for the benefit of her estate. Although the penalty will be paid to her executrix, it will be received as trustee for her next of kin and not for the creditors of her estate. In case of recovery the executor or administrator receives the penalty for death in a different capacity from that in which he would receive damages for conscious suffering.

The release given by the deceased does not bar recovery in this action for death. The case is governed by *McCarthy v. William H. Wood Lumber Co.* 219 Mass. 566 and *Boott Mills v. Boston & Maine Railroad*, 218 Mass. 582, 584. See *Church v. Boylston & Woodbury Cafe Co.* 218 Mass. 231 and *Cripps's Case*, 216 Mass. 586. See also, apparently to the same effect, *Schlichting v. Wintgen*, 25 Hun, 626. Different conclusions may be reached in States where the death statutes follow the compensatory principle of Lord Campbell's Act rather than the penalty principle of our statutes. The statute under consideration in *Hecht v. Ohio & Mississippi Railway*, 132 Ind. 507 by express terms gave a right of action for the death of the injured person only if he "might have maintained an action had he lived."

In accordance with the terms of the report let the entry be
Judgment for the plaintiff in the sum of \$1,500.

ANNIE E. O'NEILL, executrix, vs. JOHN E. O'NEILL & another.

Plymouth. January 9, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Probate Court, Appeal, Notice. Rules of Court. Notice.

Under the requirements of R. L. c. 162, § 11, Equity Rule 38 and Common Law Rule 30 of the Supreme Judicial Court, a party appealing from a decree of the Probate Court must give to the adverse party or his attorney a notice in writing of the entry of his appeal as soon after such entry as is reasonably practicable and, if such a notice is not given, the appeal may be dismissed.

A notice of an intention to take such an appeal or of the fact that an appeal has been perfected, which is given orally only, is not a compliance with the requirements of the statute and rules.

A letter written by the attorney for the appellants to the attorney for the appellees several weeks after the entry of the appeal, which enclosed a copy "of motion in the matter of the appeal from" the decree "together with proposed issues for a jury," and stated that the original was held before filing, pending a reply, is not a compliance with the statutes and rules as to notice.

No power is given to the court by R. L. c. 162, § 11, to allow the giving of an original notice of an entry of an appeal from a decree of the Probate Court after the time for the giving of such original notice has expired.

APPEAL from a decree of the Probate Court for the county of Plymouth allowing the will of Denis O'Neill, late of Abington.

After the entry of the appeal in the Supreme Judicial Court the attorneys for the executrix marked the case for trial upon the list for the next jury sitting and filed a motion to dismiss the appeal on the ground that the appellants did not give the executrix notice of the entry of the appeal as required by R. L. c. 162, § 11. The motion was heard by *Braley, J.* The material evidence is described in the opinion. The single justice refused to rule that as matter of law sufficient notice of the entry of the appeal had been given, or to order further notice, if sufficient notice had not been given, and ordered a decree dismissing the appeal. The appellants alleged exceptions.

The case was submitted on briefs.

J. E. Kelley & D. Flower, for the appellants.

W. J. Coughlan & D. R. Coughlan, for the appellee.

RUGG, C. J. The Probate Court of Plymouth County entered a decree on December 11, 1916, allowing the will of Denis O'Neill, from which his heirs at law claimed an appeal. Written notice of the appeal was filed seasonably in the Registry of Probate, the appeal was duly entered in the Supreme Judicial Court for the county on December 26, 1916, and a statement of objections was filed, all as required by R. L. c. 162, §§ 9 and 10. There was evidence that the heirs at law announced their intention to appeal at the hearing in the Probate Court. The proponent of the will testified that sometime after January 18, 1917, she was told by one of her attorneys that the appeal had been entered. Under date of January 18, 1917, the attorney for the heirs at law wrote the attorney for the proponent of the will enclosing "copy of motion in the matter of the appeal from allowance of will of the late Denis O'Neill, together with proposed issues for a jury," and stating that the original was held before filing pending a reply. Both the proponent of the will and her attorney testified that no notice of the entry of the appeal had been received. There was no evidence that any written notice had been sent other than the letter of January 18, 1917.

The single justice refused to rule as matter of law that sufficient notice had been given, and to order further notice if sufficient notice had not been given, and granted a motion to dismiss the appeal. The exceptions of the heirs at law bring the case here.

It is provided by R. L. c. 162, § 11, that in a case like the present "Notice of the entry of the appeal shall be given to all parties adversely interested who shall have entered appearances in the Probate Court, and it may be served in the manner provided by the rules of court for the service of notices; but the court may order further notice to be given." Although the practice in probate appeals follows that in equity, it is provided by Equity Rule 38 that the rules of court as to practice at common law govern the giving of notice. It is provided by Rule 30 of the Common Law Rules of the Supreme Judicial Court that "all notices . . . shall be in writing" and served personally or by mail.

It is necessary under the statute that there be "notice of the entry of the appeal." That notice by reference to the rule of court must be in writing. The statute and rule together mean that

upon the entry of the appeal written notice must be given to the adverse parties. Oral notice of intention to appeal or of the fact that the appeal has been perfected is not enough, standing alone. *Chertok v. Dix*, 222 Mass. 226. The appellee must enter his appearance within thirty days after the entering of the appeal. Equity Rule 40. This implies that the notice to the adverse parties must be substantially contemporaneous with the entry of the appeal, that is, as soon thereafter as is reasonably practicable. This is the fair import of the decision in *Bartlett v. Slater*, 183 Mass. 152, where the history of the statute and rule is reviewed.

No such notice was given. The requirement of notice is jurisdictional unless it is waived. *Daley v. Francis*, 153 Mass. 8. It is not a compliance with this essential prerequisite touching notice to correspond weeks after the entry of the appeal concerning a matter which would be meaningless if no appeal had been entered.

Power is conferred by the statute upon the court to order "further notice" only after a timely original notice has been served. But no power is conferred to allow the giving of an original notice after the time for giving it has expired. *Hack v. Nason*, 190 Mass. 346. The case is in this respect quite different from *Whitney v. Hunt-Spiller Manuf. Corp.* 218 Mass. 318. Ample relief may be afforded in proper cases by application to the court under R. L. c. 162, § 13, which gives broad power where required by justice to deal with instances where substantial or formal requisites in the prosecution of appeals have been omitted. *Capen v. Skinner*, 139 Mass. 190.

The question of waiver and compliance by the appellee with Rule V of the common law rules does not appear to have been raised before the single justice. If they were, they involved to a large extent questions of fact which must be taken by the general finding of the single justice to have been decided adversely to the heirs at law.

There is nothing to indicate that the appellee appeared generally or did anything more than to file the motion to dismiss.

Since no such notice of the entry of the appeal as is required by law was given, there was no error in granting the motion to dismiss the appeal which was directed to the jurisdiction of the court.

Exceptions overruled.

KATHERINE D. MERRILL vs. EDWARD W. PAIGE.

CHARLES W. MERRILL vs. SAME.

Essex. January 9, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Statute, Construction, Amendment. Snow and Ice. Notice. Husband and Wife.

Where the provisions of certain sections of a statute are incorporated by reference into another statute and are made to apply to the cases there provided for, the sections thus incorporated are adopted with their existing amendments, although no amendments are mentioned.

St. 1913, c. 324, which amended St. 1908, c. 305, by making certain additions relating to notice to its provisions that §§ 20, 21, and 22 of R. L. c. 51, "in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice," and re-enacted St. 1908, c. 305, as amended, made applicable to the actions therein described the provisions of R. L. c. 51, § 21, as it had been amended, and re-enacted as amended, by St. 1912, c. 221.

The requirements of the statutes above referred to are met by a notice to the owner of a building, sent in behalf of a woman by her husband and reading as follows: "My wife fell on the sidewalk in front of a building owned by you on Market Street, Monday morning, Dec. 18, 1916, and injured herself and is now under the care of a doctor. The fall was caused by the icy condition of the sidewalk."

The above notice in writing satisfies the requirements of the statutes although it was signed by the husband in his own name and nowhere contained a statement that he signed it in behalf of his wife.

It is enough if it reasonably appears in such a notice that it is given in behalf of the injured person and it is not necessary that it should so affirm in terms.

TWO ACTIONS OF TORT, the first for personal injuries received by reason of a fall upon ice on a sidewalk in front of a building owned by the defendant caused by water collected there from a spout on the building near the sidewalk. The second action was brought by the husband of the plaintiff in the first for consequential damages. Writs dated March 14, 1917.

In the Superior Court the cases were tried together before Sanderson, J. The material evidence is described in the opinion. At the close of the evidence, the judge was of opinion that the notice relied on by the plaintiffs was insufficient in law. By agree-

ment of the parties, however, the cases were submitted to the jury, who found for the plaintiff in the first action in the sum of \$500, and for the plaintiff in the second action in the sum of \$150. The defendant thereupon moved that the verdicts be set aside, and the judge allowed the motions "upon the sole ground that as a matter of law due notice of the time, place, and cause of the injury had not been given as required by statute in the case of injuries from snow or ice," and reported the case to this court for determination, with the agreement of the parties that if the notice was or might have been found to be a legal notice the motion for a new trial should be denied and judgment entered on the verdict, and if as a matter of law due notice of the time, place and cause of the injury had not been given, judgment should be entered for the defendant.

E. K. Arnold, for the defendant.

J. J. Roman, for the plaintiffs.

RUGG, C. J. The female plaintiff, hereafter called the wife, received injuries by falling upon ice on the sidewalk in front of a block owned by the defendant. There was evidence that this ice was caused by water collected by a spout on the building of the defendant and discharged within six or eight inches of the sidewalk, whither it flowed and froze. The defendant might have been found responsible for this condition. *Field v. Gowdy*, 199 Mass. 568.

The defendant called upon the wife on the day after her injury. There then was conversation respecting the time, place and extent of her injury. The defendant received on December 26, 1916, a communication bearing that date (signed by the husband, who is the other plaintiff), of this tenor: "Mr. Edward P. Dear Sir: — My wife fell on the sidewalk in front of a building owned by you on Market Street, Monday morning, Dec. 18, 1916, and injured herself and is now under the care of a doctor. The fall was caused by the icy condition of the sidewalk. Respectfully yours." Both plaintiffs rely upon this as a statutory notice.

It is not necessary to decide whether this would have been a sufficient notice under *Grebenstein v. Stone & Webster Engineering Corp.* 209 Mass. 196, and *McNamara v. Boston & Maine Railroad*, 216 Mass. 506, because since the decision of those cases the pertinent statute law has been changed. One receiving injury from

snow or ice upon a way adjoining premises of a landowner who has tortiously caused it to be there, must give a written notice as a condition precedent to any right of recovery against such landowner. *Baird v. Baptist Society*, 208 Mass. 29. It is enacted by St. 1913, c. 324 (which is an amendment of St. 1908, c. 305, amending R. L. c. 51, §§ 20-22, and re-enacting those sections as amended), that "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply" to cases like the present. There is no express reference among these words to amendments to the designated sections occurring after the enactment of St. 1908, c. 305. Section twenty-one, however, had been amended previous to 1913 in a material particular by St. 1912, c. 221. The form of that amendment was in these words: "Section 1. Section twenty-one of chapter fifty-one of the Revised Laws, as amended by section one of chapter one hundred and sixty-six of the acts of the year nineteen hundred and ten, is hereby further amended by adding at the end thereof the words: — Any form of written communication signed by the person so injured, or by some person in his behalf, or by his executor or administrator, or by some person in behalf of such executor or administrator, which contains the information that the person was so injured, giving the time, place and cause of the injury or damage, shall be considered a sufficient notice,—so as to read as follows:—Section 21 . . . " Then follows § 21 in its complete form as amended, including both the words theretofore composing it and those newly added by the amendment. The section in its previous form thereafter ceased to exist altogether as a statute. It became embodied as a part of a new and different statute. The words of the former statute incorporated with the modifying sentence now appended by the amendment constitute a rectified section expressive of the present mandate of the general court upon the subject. The old § 21 has become a thing of the past. It has been superseded by a new section of the same number. The express statement of legislative purpose is that the section shall be transformed "so as to read as follows." There is no reason why that positive affirmative declaration should not be given effect. Section 21 became after that amendment as if originally enacted

in that phrase. It was not necessary, therefore, in enacting St. 1913, c. 324, to do more than refer to "section twenty-one" in order to make manifest a design that that section in its amended form should be applicable. For convenience of reference and to avoid confusion often reference is made to the amending act. But under the circumstances here disclosed the reference imported the section as amended respecting notice into the snow and ice statute. *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 17.

No discussion is required to demonstrate that the letter sent to the defendant was a written communication containing the information that the wife had suffered damages by ice with sufficient specifications as to the time, place and cause of her injury.

The notice was signed by the husband and not by the wife. There is no direct statement to the effect that it was signed by him in her behalf. It is not necessary that the notice should affirm in terms that it is given in behalf of the injured person. It is enough if this reasonably appears. Under the facts here disclosed the present signature was enough to comply with the requirements of the law. *Meniz v. Quissett Mill*, 216 Mass. 552, 555. *Greenstein v. Chick*, 187 Mass. 157.

The entry in each case, in accordance with the terms of the report, may be

Judgment on the verdict.

FRANK W. MORRISON, administrator, *vs.* JOHN D. HASS.

SAME *vs.* ALMA M. HASS.

SAME *vs.* CHARLES A. FLAMMER.

Norfolk. January 9, 10, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Conflict of Laws. Comity. Executor and Administrator. Conversion. Jurisdiction, Of court of other State. Evidence, Presumptions and burden of proof. Judgment, Of court of other State.

A testatrix died, having her domicile in this Commonwealth and leaving property both in this Commonwealth and in the State of New York. Her will was not offered for probate in this Commonwealth, but was proved in a Surrogate's Court in the State of New York and her son was appointed by that court the executor of her will. Thereafter the Probate Court for the county of this Com-

monwealth in which the testatrix was domiciled at the time of her death, upon a petition filed by the Tax Commissioner, appointed a certain person the administrator of her estate, and that person brought actions of tort for alleged conversion of personal property belonging to her estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor. It was agreed that the plaintiff knew of no unpaid debts of the testatrix either at the time of his appointment or when the actions were brought, unless any inheritance taxes that might be assessed could be considered debts. No statutes of the State of New York as to the jurisdiction of the Surrogate's Court were put in evidence and there was nothing to show the ground on which the New York court deemed it necessary or advisable to permit the proof of the will in that State before it had been presented for proof in this Commonwealth. *Held*, that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained.

In the case above described it was *pointed out* that St. 1909, c. 527, § 7, amending St. 1907, c. 563, § 16, and relating wholly to taxes on legacies and successions, had no application.

In the same case it was *said* that, there having been no contention that R. L. c. 148, § 3, was applicable, it was not necessary to consider the construction of that statute.

THREE ACTIONS OF TORT, by the administrator appointed in this Commonwealth of the estate of Mary D. Hass, late of the town of West Stockbridge, for the alleged conversion of personal property belonging to the plaintiff as the administrator of that estate. Writs dated September 6, 1916.

In the Superior Court the cases were heard together by *Wait, J.*, upon an agreed statement of facts, containing the facts that are stated in the opinion. In each of the cases the judge ruled that the plaintiff could not recover and found for the defendants. The plaintiff alleged exceptions.

F. W. Morrison, (*A. E. Seagrave* with him,) for the plaintiff.

E. B. Chapin, for the defendants.

DE COURCY, J. Mary D. Hass died on September 22, 1910; the defendants John D. Hass and Alma M. Hass are her children and the sole beneficiaries under her will. She was a resident of West Stockbridge in this Commonwealth and owned property in New York and in Massachusetts. A large portion of her estate consisted of her interest under the will of her husband, John D. Hass, senior, which had been proved in New York State; and she,

as executrix, was carrying out the administration of his estate at the time of her death.

The original will of Mrs. Hass was filed and admitted to probate in the Surrogate's Court for the County and State of New York, and letters testamentary were issued to said John D. Hass, he being the only one of the executors named in the will to qualify. He proceeded with the settlement of her estate, took possession of all her personal property, including her interest in the estate of her husband, (having completed the administration of that estate,) and including also the personal estate in this Commonwealth, and filed an inventory in the Surrogate's Court. Before April 1, 1911, he had paid all known debts of the testatrix, and the expenses of administration and had distributed the estate in accordance with the terms of her will. At that time he also, as administrator with the will annexed, had distributed the personal estate of John D. Hass, senior.

On November 30, 1914, the Probate Court of Berkshire County appointed the plaintiff, Frank W. Morrison, administrator of the estate of Mary D. Hass on a petition filed in March, 1912, by the Tax Commissioner. The plaintiff, on February 3, 1915, made a demand on each of the defendants that he (or she) "deliver up to the plaintiff as administrator all of the property of Mary D. Hass to which the plaintiff was entitled and which was in their possession."

In addition to the foregoing facts, it is agreed that the plaintiff knew of no unpaid debts of Mary D. Hass at the date of his appointment or when this action was brought, unless any inheritance taxes that might be assessed could be considered debts. See *Boston v. Turner*, 201 Mass. 190. An inventory of the estate was filed with the Tax Commissioner by the defendant John D. Hass on May 12, 1915, and the commissioner fixed a valuation on the estate in accordance with the statutes; but the defendant Hass has never received any valuation from the commissioner and no tax has been assessed thereon. No bill for a Massachusetts inheritance tax has been rendered to any of the defendants.

These actions were brought by the plaintiff as administrator of the estate of Mary D. Hass to recover for the alleged conversion of certain personal property that was owned by her. In the case of John D. Hass the acts relied on are his taking possession and control of the property, already referred to, as executor under

the will of his mother and as administrator with the will annexed of the estate of his father. The defendant Alma M. Hass is charged with conversion, because, with the authority of said executor, she removed certain household furniture and other personal property to New York and received payments of income from her mother's estate, paid by John D. Hass as executor or trustee of her mother's will proved in New York. The alleged conversion by the defendant Flammer consists of his possession, during the summer of 1914, of a key to a New York safe deposit vault containing securities belonging to Mary D. Hass. He never used the key to open the vault and it does not appear that he had possession of it at the time of the demand. He also turned over to John D. Hass as executor certain interest received by him on a mortgage owned by Mary D. Hass at the time of her death.

The three cases were tried together in the Superior Court on an agreed statement of facts. The judge refused to give any of the numerous rulings requested by the plaintiff, and found for the defendants; and the cases are here on the plaintiff's exceptions. A single bill of exceptions is used, as the same questions of law are involved in all the cases.

In view of the agreed fact that Mary D. Hass died domiciled in West Stockbridge in this Commonwealth, the primary proof of her will presumably should have been in our county of Berkshire. But the Surrogate's Court of New York also had jurisdiction to admit her will to probate, as she owned bonds of New York corporations, a New York mortgage bond and an interest in her husband's real estate in New York. *Crippen v. Dexter*, 13 Gray, 330. *Rackemann v. Taylor*, 204 Mass. 394, 402. The record does not disclose the statutory provisions of New York applicable to the jurisdiction of its courts of probate; and, as the statutes and decisions of that State were not put in evidence, they cannot be considered by us under the general stipulation in the agreed statement of facts. *Electric Welding Co. Ltd. v. Prince*, 200 Mass. 386. *Russell v. Joys*, 227 Mass. 263. We have no means of knowing the ground on which the New York court deemed it necessary or advisable to entertain a petition for proof of the will before it was considered in this Commonwealth, as the decree of that court and the petition on which it was granted are not before us. In these circumstances we must assume that the Surrogate's Court

found such facts to exist as authorized it under the law of New York to allow original proof of the will; and as matter of comity we must recognize the judgment of that court as conclusive. *Crippen v. Dexter, ubi supra.*

The defendant John D. Hass as executor clearly had a right to hold and administer the property of his mother which was in New York at the time of her death as within the jurisdiction of the New York administration. See *Lockwood v. United States Steel Corp.* 209 N. Y. 375; *Matter of Accounting of Hughes*, 95 N. Y. 55. And, at common law at least, he could take possession of the goods or credits of the estate in this State with the consent of the party having possession, provided he did not have to invoke the aid of the courts of this jurisdiction, — especially as there were no local creditors of the deceased. *Hutchins v. State Bank*, 12 Met. 421. *Gardiner v. Thorndike*, 183 Mass. 81. *Wilkins v. Ellett*, 108 U. S. 256, 258. This common law rule is applicable in the present cases, notwithstanding St. 1909, c. 527, § 7, (amending St. 1907, c. 563, § 16,) on which the plaintiff relies in part. That is a statute dealing entirely with inheritance taxes. It provides in substance (§ 7) that any person who delivers assets belonging to the estate of a non-resident decedent before all taxes imposed thereon by the provisions of the act have been paid or secured shall be liable to such tax. This statute cannot avail the plaintiff in these actions, for the reason, among others, that the liability created by the act can be enforced only in an action of contract brought by the Treasurer and Receiver General. As the plaintiff has not contended that R. L. c. 148, § 3, is applicable we do not deem it necessary to consider the construction of that act. See *Gardiner v. Thorndike*, 183 Mass. 81, 85.

It follows from what we have said that the defendants are not liable in actions of conversion to the plaintiff for property taken by or under the authority of the New York executor, and paid over to the persons legally entitled thereto after the payment of debts. The question of the liability of the defendant John D. Hass for the inheritance taxes is not involved in these actions. The conclusion reached renders it unnecessary to consider in detail the plaintiff's numerous requests for rulings. In each case the entry must be

Exceptions overruled.

FRANK W. MORRISON, administrator, vs. BERKSHIRE LOAN AND TRUST COMPANY.

Berkshire. January 9, 10, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Executor and Administrator. Payment.

A voluntary payment of a debt to an executor of the will of the creditor appointed in another State by the law of which he is authorized to receive it is valid.

A testatrix at the time of her death had her domicile in this Commonwealth but her will was not offered for probate here and was proved in a Surrogate's Court in the State of New York, that was assumed to have had jurisdiction to admit the will to immediate probate, as decided in *Morrison v. Hass*, ante, 514. A trust company in this Commonwealth, which held money that belonged to the testatrix at the time of her death, paid it to such executor upon demand, and four years later the Probate Court of the county of this Commonwealth in which the testatrix was domiciled at the time of her death, upon a petition filed by the Tax Commissioner, appointed a certain person the administrator of her estate, who demanded from the trust company the payment of the fund that had belonged to the intestate on the ground that its payment to the New York executor was unauthorized. *Held*, that the defendant had the right to make the payment to the New York executor if it chose to do so without invoking the protection of our courts.

In the same case it was *pointed out* St. 1909, c. 527, § 7, had no application to the action.

In the same case it was *said* that R. L. c. 148, § 3, not having been relied upon by the plaintiff nor referred to by him as applicable, need not be considered.

CONTRACT by the administrator appointed in this Commonwealth of the estate of Mary D. Hass, late of the town of West Stockbridge, to recover \$1,334.08 deposited by Mary D. Hass with the defendant and in its hands at the time of her death. Writ dated March 23, 1916.

In the Superior Court the case was heard by *Chase, J.*, upon an agreed statement of facts, containing the facts that are stated in the opinion. The judge refused to rule that the plaintiff was entitled to recover and found for the defendant. The plaintiff alleged exceptions.

F. W. Morrison, (*A. E. Seagrave* with him,) for the plaintiff.

E. B. Chapin, for the defendant.

DE COURCY, J. It appears in the agreed statement of facts that Mary D. Hass died on September 22, 1910, testate, and that at the time of her death she had an account with the Berkshire Loan and Trust Company of Pittsfield in this Commonwealth. Her will was proved and allowed by the Surrogate's Court of the County and State of New York and John D. Hass was appointed executor and duly qualified as such. On November 30, 1910, the defendant paid over to that executor the deposit, then amounting to \$1,334.08. Four years later the plaintiff was duly appointed administrator of the estate of said Mary D. Hass in our county of Berkshire, — no document purporting to be the will of said Mary D. Hass having been filed for probate in that county. After making demand on the defendant for the payment to him as administrator of said \$1,334.08, on March 23, 1916, he brought this action of contract for the recovery of that sum with interest. The trial judge found that the domicil of Mary D. Hass at the time of her death was in West Stockbridge in the county of Berkshire, refused to make certain rulings requested by the plaintiff and found for the defendant.

This case was argued with that of *Morrison v. Hass*, *ante*, 514. For the reasons stated therein we must assume that the New York court had jurisdiction to admit the will of Mrs. Hass to original probate and that at common law John D. Hass, as executor, had a right to collect the debt due to the estate in this jurisdiction, provided the debtor was willing to make payment without invoking the protection of our courts. *Rackemann v. Taylor*, 204 Mass. 394. *Gardiner v. Thorndike*, 183 Mass. 81. And see *Kennedy v. Hodges*, 215 Mass. 112; *Smith v. Second National Bank of New York*, 169 N. Y. 467.

The contention of the plaintiff, that the payment of the deposit by the defendant was invalid by reason of St. 1909, c. 527, § 7, cannot prevail. Under that statute "Any person or corporation that delivers or transfers any securities or assets belonging to the estate of a non-resident decedent before all taxes imposed thereon by the provisions of this act have been paid or secured according to law, shall be liable for such tax in an action of contract brought by the Treasurer and Receiver General." The record in this case makes no reference to the existence of any inheritance tax, nor is this a proceeding by the proper State official to enforce a liability

for such a tax. This action is one by an administrator to compel the defendant to pay a second time the entire deposit, on the ground that the first payment was unauthorized and invalid.

As the plaintiff has not relied upon or referred to R. L. c. 148, § 3, as applicable to this case, we deem it unnecessary to consider it. See *Gardiner v. Thorndike*, 183 Mass. 81, 85.

Exceptions overruled.

STEPHEN MOORADJIAN'S (dependent's) CASE.

Suffolk. January 10, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Nature of injury, Dependency.

The death of an employee, which was caused by overheating occasioned by unusually hard labor performed after the end of the ordinary work of the day and in a close and overheated atmosphere, may be found to have resulted from an injury covered by insurance under the workmen's compensation act.

Upon the claim of the alleged dependent widow of a deceased employee under the workmen's compensation act, if it appears that the employee came to this country from Armenia three and a half years before his death and since that time had lived and worked here continuously, while his wife had remained in Armenia, it cannot be found that his wife was living with him at the time of his death, and therefore under St. 1911, c. 751, Part II, § 7, she is not presumed conclusively to have been wholly dependent upon his earnings for support and the question of her dependency must "be determined in accordance with the fact" as it was at the time of her husband's injury.

One who was dependent upon the earnings of a deceased employee for support at the time of his death is not debarred from receiving compensation under the workmen's compensation act by reason of residence in a friendly foreign country. Following *Derinza's Case*, *ante*, 435.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to the alleged dependent widow in Armenia of Stephen Mooradjian, who at the time of his injury and death was in the employ of the Parkhill Manufacturing Company, a corporation, his regular employment being in the bleaching room of that company, although at the time of his death he was doing extra overtime work in the dyeing room of that company.

The decision appealed from included the following finding: "The evidence shows that the employee, Stephen Mooradjian, received a personal injury which arose out of and in the course of his employment on June 25, 1914, said personal injury causing his death. The employee left a widow, Shamo Mooradjian, who was living with him at the time of his injury and death, within the legal meaning of the phrase, and she is therefore conclusively presumed to be wholly dependent upon him for support."

The decision concluded as follows: "The board therefore finds, upon all the evidence, that the employee, Stephen Mooradjian, received a personal injury resulting fatally on June 25, 1914, said personal injury arising out of and in the course of his employment; and that his widow, Shamo Mooradjian, who was living with him at the time of his death, is entitled to the payment of a weekly compensation of \$4.05 for a period of three hundred weeks from June 25, 1914, the date upon which the injury occurred."

The case was heard by *Fox, J.* The evidence reported is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, and the insurer appealed.

The case was submitted on briefs.

H. S. Avery, for the insurer.

A. Z. Goodfellow & J. R. Fuller, for the dependent widow.

RUGG, C. J. The evidence warranted a finding that the deceased received "a personal injury arising out of and in the course of his employment" by a subscriber under the workmen's compensation act. St. 1911, c. 751, Part II, § 1. He worked in a cotton mill. The material evidence was that on an unusually hot twenty-fifth of June the deceased, having finished for the day his usual rather light labor performed in a room considerably cooler than the out of door temperature, undertook the much more severe, continued and active overtime work of lifting heavy pieces of hot, damp cloth in a moist room (ordinarily ventilated by fans, which had stopped with the end of the regular hours of work), where the temperature was materially higher than out of doors. He worked under this physical strain for about forty minutes. Shortly afterwards his lifeless body was found near a faucet where he had gone to wash his face and hands. Two physicians testified in substance that, in their opinion, the employee died from the

combined effects of a heart weakness, probably a valvular trouble, the exertion of his work in the close room, and the high temperature caused by the heat of the room and the especially hot weather, that he would not have succumbed and met his death with either of these factors absent and that all were contributing causes.

As has been repeatedly pointed out in opinions of this court, our workmen's compensation act differs from many other similar statutes in that the injury need not be an accident. The death in the case at bar might well have been found to have resulted from overheating arising from unusually hard labor, after the end of the ordinary work of the day, performed in a close and superheated atmosphere. In principle the case is indistinguishable from *McPhee's Case*, 222 Mass. 1, *Madden's Case*, 222 Mass. 487, *McManaman's Case*, 224 Mass. 554. A physical impact is not an essential prerequisite to a personal injury under the act. *Brightman's Case*, 220 Mass. 17. A direct causal connection might have been found to exist between the conditions under which the kind of labor was performed by the employee and his decease. *McNicol's Case*, 215 Mass. 497.

The finding, that the wife of the deceased was living with him at the time of his death and hence conclusively presumed to be totally dependent upon his earnings for support, cannot stand. He came to this country from Armenia three and a half years before his death, and since had worked and lived here continuously. His wife remained in Armenia and lived there. They were not living together. *Nelson's Case*, 217 Mass. 467. *Gorski's Case*, 227 Mass. 456. *Derinza's Case*, ante, 435.

The question of the wife's dependency must "be determined in accordance with the fact" as it was at the time of the injury to the husband. Part II, § 7, last paragraph. *McDonald's Case*, ante, 454.

The wife is not debarred from receiving compensation under the act by reason of the fact that she is a non-resident alien. *Derinza's Case*, ante, 435.

The decree is reversed. The case must be remanded for further consideration by the Industrial Accident Board.

So ordered.

MASSACHUSETTS BIOGRAPHICAL SOCIETY vs. JAMES S. RUSSELL
& another, executors.

Suffolk. January 11, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, What constitutes, Construction. *Damages*, In contract.

In an action of contract to recover the sum of \$250 it appeared that the defendant signed an instrument in writing containing the following provisions: "I hereby authorize you to execute for me a full-page Photo-Steel Engraved Plate and to insert prints therefrom in the Biographical and Historical work 'Biographical History of Massachusetts,' the plate reverting to me as my property. . . . The total expense for the making of the plate and insertion of the portrait, including one dozen artist's proofs with enlarged margin, is to be \$250.00, for which I hand you my check, payable to H M P & Co., Depositories." The plaintiff testified that he agreed orally to do all the things for which the \$250 was to be paid. *Held*, that a finding was warranted that the oral agreement testified to by the plaintiff made the contract a bilateral one, and that by its terms the defendant promised to pay \$250 forthwith in consideration of the plaintiff's promise and before performance by the plaintiff.

CONTRACT by the Massachusetts Biographical Society, a corporation, originally against Mary F. Russell of Milton, who died on April 2, 1916, and afterwards against the defendants as the executors of her will, upon a contract in writing, which is printed in full in the opinion. Writ in the Municipal Court of the City of Boston dated February 12, 1915.

The answer contained a general denial and a specific denial of the signature upon the alleged contract, requiring "proof of the same at the trial."

The nature of the evidence at the trial in the Municipal Court is described in the opinion. James, mentioned in the opinion, the assignor of the plaintiff, who testified to the making of the contract, "was the president of the plaintiff corporation and was the person having the main financial interest therein."

The following rulings requested by the defendants are mentioned in the opinion:

"4. That writing one's name on a paper does not constitute a signature unless written with the intent to have it operate as such.

"5. That on all the evidence in the case there was no evidence that Mrs. Russell wrote her name with intent to have it operate as a signature on the so called contract of the plaintiff."

"11. That on all the evidence in the case there was no evidence of a promise by James to perform the work authorized in the document."

The judge refused to make any of these rulings.

The following rulings requested by the defendants also are mentioned in the opinion:

"7. That the offer contained in such document could be revoked by the defendant at any time before the performance of the consideration by the plaintiff."

"20. That in order to find for the plaintiff the court must find that James at his interview with the defendant made a promise, express or implied, to do the things authorized by the writing entitled Biographical History."

The judge made both of these rulings last quoted above. He found for the plaintiff for the amount claimed in the declaration, which was \$250, and at the request of the defendants reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed; and the defendants appealed.

P. Nichols, for the defendants.

L. Powers, for the plaintiff.

DE COURCY, J. The agreement on which this action is based is as follows:

"Biographical History of Massachusetts.

Massachusetts Edition United States Biographical Series

I hereby authorize you to execute for me a full-page Photo-Steel Engraved Plate and to insert prints therefrom in the Biographical and Historical work 'Biographical History of Massachusetts,' the plate reverting to me as my property.

The work is to be hand-bound in elegant crushed morocco, artistically decorated, gold top and special design.

The text of 'Biographical History of Massachusetts' is to be printed on specially high-grade paper.

The work is to be illustrated throughout with artistic full-page portraits.

The total expense for the making of the plate and insertion of the portrait, including one dozen artist's proofs with enlarged

margin, is to be \$250.00, for which I hand you my check, payable to H. M. Plimpton & Co., Depositories.

Countersigned: _____
 "Signed Mrs. H. S. Russell
 Address Milton
 Date April 6th 1910"

On the testimony of Thomas N. James (the plaintiff's assignor) the judge of the Municipal Court was warranted in finding that Mrs. Russell (the defendants' testatrix) signed this paper, and that she did so "with intent to have it operate as a signature on the so called contract." This disposes of the defendants' fifth request; and the finding for the plaintiff renders the fourth inapplicable, — even assuming that it correctly stated an abstract proposition of law. *Aradalou v. New York, New Haven, & Hartford Railroad*, 225 Mass. 235, 240.

In refusing the defendants' eleventh request, and giving the twentieth, the judge must have found upon the evidence that James bound himself to do the things named in the printed agreement, in other words, that the contract was a bilateral one. We cannot say that conclusion was not warranted. Presumably he found that James made an offer which Mrs. Russell accepted. *Elastic Tip Co. v. Graham*, 174 Mass. 507. *Burroughs Adding Machine Co. v. Mount Auburn Cemetery*, 217 Mass. 378. The obligation of Mrs. Russell to pay \$250 was not dependent on the performance of the obligation assumed by the plaintiff's assignor, which was to be carried out later. *International Textbook Co. v. Martin*, 221 Mass. 1. *Loveland v. Epstein Drug Co.* 227 Mass. 311. It is unnecessary to consider what construction was placed by the judge on the seventh request; as the defendants asked for it, they cannot complain because it was given.

The defence raised by the pleadings was that Mrs. Russell did not enter into a contract, not that she was induced to enter into a contract by fraudulent misrepresentations. And it is now recognized by the defendants that the alleged fraudulent misrepresentations of fact contained in the letter to Mrs. Russell and the alleged misleading designation of the proposed work do not constitute a defence in this action.

The foregoing disposes of all the requests argued by the defendants except those relating to damages. As already said, the

judge was warranted in finding that Mrs. Russell promised to pay the \$250 forthwith, and that the payment was not dependent upon the previous performance by James of his agreement to publish the sketch and portrait of her husband. *International Textbook Co. v. Martin, supra*. No error appearing on the record, the order of the Appellate Division dismissing the report must be affirmed; and it is

So ordered.

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WILLIAM W. MANNING & another, trustees, vs. JAMES H. MANNING
& others.

Middlesex. January 15, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Devise and Legacy, Who takes. Words, "Their issue," "Issue."

A testator provided by his will that a trust fund, from which during the lives of his four children and the survivor of them the income was to be paid in substantially equal sums to his children and to the children of any deceased child by representation, upon the death of his last surviving child should be conveyed and delivered "to all my then surviving grandchildren and their issue," and it was held that the whole will showed a dominant purpose of the testator to treat his children or their issue with substantial equality in distributing the income and strongly indicated a purpose to distribute the principal in a like manner among the living grandchildren and the issue of those who should die before the time of distribution, and accordingly that the clause quoted above should be construed as if it read, "to all my then surviving grandchildren and [in case of their death to] their issue."

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex, on August 15, 1917, by the trustees under the will of Prentiss Hobbs, late of Brighton, for instructions as to the distribution of the estate and property in their hands as such trustees upon the death of Elizabeth L. Howe, the last survivor of the children of the testator, who died on February 27, 1916.

The judge of the Probate Court made a decree "that the grandchildren of said Prentiss Hobbs living at the death of Elizabeth L. Howe, but none of the other defendants, are entitled to the estate in the hands of the plaintiffs to be distributed, and that those so entitled are entitled thereto in equal shares, any issue to take the share of their deceased ancestor by right of representation."

Certain of the defendants appealed, making various contentions as stated in the opinion.

The appeals came on to be heard together, upon the pleadings, the copy of the will annexed to the bill and a stipulation as to agreed facts, before *Carroll, J.*, who at the request of the parties reserved the case for determination by the full court, such decrees to be entered as equity and justice might require.

F. B. Newton, for the plaintiffs, stated the case.

G. P. Wardner, for the grandchildren of the testator.

R. L. Robbins, guardian *ad litem*, for great-grandchildren of the testator.

C. H. Walker, guardian *ad litem* and next friend of Wayland M. Minot, Jr.

DE COURCY, J. Prentiss Hobbs died on August 28, 1858, leaving an estate worth about \$125,000. His wife predeceased him; and he was survived by his four children, Abby R. (Manning), Lydia, Joshua B. F., and Elizabeth L., born respectively in the years 1831, 1836, 1837 and 1839. A grandchild, Prentiss Hobbs Manning, also survived him; and Mrs. Manning was the only one of the testator's children then married.

The will of Mr. Hobbs was executed ten days before his death. He bequeathed his estate, subject to the payment of his debts, to trustees, provided an annuity of \$50 for his mother-in-law, Mrs. Lincoln; and directed the trustees to pay out of the income \$1,000 a year to each of his daughters, and \$600 a year to his son, during their several lives. He then directed as follows:

"6th. On the decease of either of my said four children, leaving issue or descendants of such issue, then In Trust, to pay to such issue or descendants, annually, in quarterly instalments, the sum hereinbefore given to the parent of such issue or descendants — until the decease of the last Survivor of my said four children — And

7th. Upon the decease of the said last Survivor then In Trust, to convey and deliver to all my then surviving grandchildren and their issue, all my said estate and property, with the increase thereof in equal shares — in fee simple and full property, forever —"

Mrs. Lincoln has died. The last survivor of the testator's children, Elizabeth L. (Howe), died on February 27, 1916; and

all of them except the son, Joshua B. F. Hobbs, left issue surviving them. The only question now presented on this bill for instructions is, who were entitled to the principal of the trust estate at the death of the last life tenant? The contention of the fifteen surviving grandchildren is that the estate should be distributed among them in equal shares *per capita*. The guardian *ad litem* for the minor great grandchildren contends that the estate should be conveyed to or distributed among the testator's then surviving fifteen grandchildren and sixteen great-grandchildren, in equal shares *per capita*. The guardian *ad litem* for Wayland M. Minot, Jr., argues that the estate should be divided among the fifteen grandchildren, the sixteen great-grandchildren, and the one great great-grandchild living at the death of the last life tenant, in equal shares, — each taking one thirty-second part. As the position of both guardians *ad litem* is the same, except in the one respect of the extent to which generations more remote than great-grandchildren may be included within "issue," we shall embrace the contentions of both when dealing with the great-grandchildren, unless otherwise stated.

At the threshold, it is apparent that the interpretation proposed by the great-grandchildren would lead to unreasonable and inequitable results. By allowing the grandchildren and great-grandchildren to take simultaneously it admits children to compete with their living parents, — a construction to be avoided unless such plainly was the testator's intention. *Dick v. Lacy*, 8 Beav. 214, 221. *Audsley v. Horn*, 29 L. J. Ch. (N. S.) 201. Further, although on the death of either of the testator's children during the fifty-seven years preceding the death of the last survivor, Mrs. Howe, the "issue or descendants" of such deceased child would succeed to the parent's share of the income under article sixth of the will, yet on the death of Mrs. Howe the issue of any deceased grandchild would not only be excluded from all share in the principal, but the income which they had been receiving would be cut off. The proposed construction also would involve some surprising discriminations in individuals and families. For instance, as only the issue alive at the death of the last life tenant can take, children born to the grandchildren after the period of distribution would be excluded, while their brothers and sisters born before that period would take directly under the will. Again,

as pointed out by counsel, at the death of the last life tenant, the grandson, Herbert H. Howe, was as yet unmarried, whereas his older brother, William P. Howe, had six children. Under this construction the family of William would get seven parts while that of his brother would get but one; and the entire family of another grandson, Wayland Manning, would get but two, as he had only one child at the death of the last life tenant.

An intention so capricious and inequitable should not be attributed to a testator, who admittedly was "a kind father," and whose "relations with the children were affectionate," unless it is plainly manifested by the language of his will. It is not decisive that the strict grammatical construction of a separate clause would warrant the conclusion urged on behalf of the great-grandchildren. As was said in *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 98, "The general principles which apply to the construction of a clause similar to the one in question are well settled. While care must be taken that courts do not undertake to make wills for testators, and while their meaning is not to be ascertained by mere conjecture as to what they may have intended, the true meaning of words used is to be arrived at by considering them in their relation not only to the clause immediately in question, but to the whole will. Their more grammatical or ordinary sense is not to be adhered to, if it would be repugnant to or inconsistent with the remainder of the instrument." And when an examination of the will as a whole makes clear the general intention of the testator, that must control the interpretation of a clause which is of ambiguous or uncertain meaning. *Tibbetts v. Tomkinson*, 217 Mass. 244. *Miller v. Idaho Industrial Institute*, 222 Mass. 188.

The language in controversy, providing for the distribution of the trust estate "to all my then surviving grandchildren and their issue," is open to different constructions. As stated in 28 Halsbury's Laws of England, § 1436: "In a gift to a donee 'and his children' or to a donee 'and his issue' the last words in each case are capable of being used as words of limitation, or words of description of persons to take either concurrently with or in succession to the named donee, or in substitution for him." There is ample authority for construing "their issue" as words of limitation, whereby the surviving grandchildren would take estates tail in the real

estate and absolute interests in the personal property. *Coulden v. Coulden*, [1908] 1 Ch. 320. *Parkman v. Bowdoin*, 1 Sumn. 359. *Wheatland v. Dodge*, 10 Met. 502. *Albee v. Carpenter*, 12 Cush. 382. Or, the language used might vest a life estate in the grandchildren with remainder to their issue, *Audsley v. Horn*, 29 L. J. Ch. (N. S.) 201, or concurrent interests in the first and second donees, *Clay v. Pennington*, 7 Sim. 370, *Buffar v. Bradford*, 2 Atk. 220. Again, the language in article seven may be construed as an alternative original gift to the surviving grandchildren and the issue of any deceased grandchild by right of representation. *Burrell v. Baskerfield*, 11 Beav. 525. *Re Stanhope's Trusts*, 27 Beav. 201. *Hall v. Hall*, 140 Mass. 267.

In determining which of these possible interpretations should be adopted, it is important to discover what was the general intent of the testator, as shown by an examination of the entire will, in the light of the circumstances existing when he made it. His children were then aged substantially twenty-seven, twenty-two, twenty-one and nineteen years, and only one grandchild was living. Aside from an annuity of \$50 to Mrs. Lincoln, his entire estate is given to his children and their issue. His children share in the income only, but with substantial equality, the daughters receiving annually \$1,000 each and the son \$600. Contemplating the probability of grandchildren, which in time was realized, he provided for them in the event of the parent's death before the time for distributing the principal, and in doing so maintained his plan of substantial equality by giving to such grandchildren the share of the income that their deceased parent had enjoyed.

This dominant purpose of the testator to treat his children (or their issue) with substantial equality in distributing the income, strongly indicates a purpose to distribute the principal with like substantial equality among the living grandchildren and the issue of those who should die before the time of distribution — such issue taking, as alternative and original donees, the share their ancestor would have taken had he survived the life tenant. Such a construction of article seven not only is in conformity with the rest of the will, but it avoids the unreasonable and unfair results that must follow from either of the other interpretations suggested, — results which plainly would not effectuate the intention of the testator. It merely expresses what seems to us

to have been his intention by construing the clause in controversy as if it read, for instance, "to all my then surviving grandchildren and [in case of their death to] their issue." As was said in *Jackson v. Jackson*, 153 Mass. 374, 377, "The tendency of our decisions has been more and more to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants and importing representation, and certainly, when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors." *Hall v. Hall*, 140 Mass. 267. *King v. Savage*, 121 Mass. 303. *Dexter v. Inches*, 147 Mass. 324. *Hills v. Barnard*, 152 Mass. 67. *Coates v. Burton*, 191 Mass. 180. *Sanger v. Bourke*, 209 Mass. 481, 488. *Coulden v. Coulden*, *supra*. *Vaughan v. Dickens*, 22 N. C. 52. *Loomer v. Loomer*, 76 Conn. 522.

Decree of Probate Court affirmed.

FRANK CLAPP vs. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD COMPANY.

JOHN BRENNAN vs. SAME.

Middlesex. January 15, 1918. — February 26, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Railroad, In maintaining planking at grade crossing. *Evidence*, Competency.

In an action against a railroad corporation for damage to the plaintiff's wagon and horses by reason of one of the plaintiff's horses catching one of his fore feet in a space between the planking and a rail of the defendant's track at a grade crossing of a highway which it was the duty of the defendant to maintain, there was evidence that the distance between the planking and the rail where the horse caught his foot was two and a half inches and that the edge of the planking was worn and sloped down on the side toward the rail and was slippery, and it was *held* that this warranted a finding that the crossing was in a defective condition which rendered it unsafe for travellers and that such condition could have been discovered and remedied by the exercise of reasonable care and diligence on the part of the defendant.

In the same case the plaintiff was allowed to go to the jury on the question whether the engineer was running the engine at an excessive and unreasonable rate of

speed. The crossing tender testified that as soon as the horse fell he started from his shanty near the crossing and ran up the track on which the train was approaching with a red flag to stop the train, that he travelled from the shanty up the track about three hundred and thirty feet and that he saw the train when he was about half way to where he stopped, that the train was then about two hundred and fifty feet beyond a certain tower which was over eight hundred feet from the crossing. There was evidence that there were two or three freight cars on a side track about two hundred and fifty feet from the crossing and also that there was a curve in the track between the crossing and the approaching train, and that both of these things somewhat obstructed the engineer's view of the crossing. *Held*, that upon all the evidence it was a question for the jury whether the engineer saw the crossing tender or in the exercise of reasonable care ought to have seen him and have stopped his train in time to avoid the collision.

In the same case there also was evidence that the train consisted of five or six cars, each from forty to sixty feet long, that when it struck the plaintiff's wagon it was running at the rate of fifteen or twenty miles an hour and that it was not brought to a stop until all but the last car had passed over the crossing. It appeared that the crossing was "a few hundred feet" from a passenger station at which the train was to stop. *Held*, that this court could not say that there was not evidence from which the jury might have found that the train was running faster than was reasonable under the circumstances.

In the same case it was *held* that evidence as to the height of the gates at the crossing and whether the engineer could have seen that they were raised was admissible in connection with other evidence upon the question, whether he was running the train at an unreasonable rate of speed as he approached the crossing.

In the same case it was *held* that evidence as to the speed of the train was competent for the same purpose.

TWO ACTIONS OF TORT, the first by the owner of a wagon and the second by the owner of a pair of horses, for damage to the wagon and the horses from being run into by an engine and train of the defendant at a grade crossing of the tracks of the railroad operated by the defendant with Worcester Street in Framingham on February 17, 1915. Writ dated March 31, 1915.

Counts one and three of the declarations on which the cases were tried are described in the opinion.

In the Superior Court the cases were tried together before *Keating, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make, among others, the following rulings:

"1. On all the law and the evidence the plaintiff cannot recover on the first count."

"3. On all the law and the evidence the plaintiff cannot recover on the third count."

"5. There is no evidence of the defendant's negligence."

"7. It was not negligence on the part of the defendant not to maintain for the engineer a clear view of the crossing for a distance of five hundred or six hundred feet north of the crossing.

"8. The fact that the engineer did not see the crossing until he had passed the end of the last freight car is no evidence of negligence of the defendant or its agents or servants.

"9. If you find that the engineer did not see the crossing until he had passed the end of the last freight car, that fact is nevertheless no evidence of negligence of the defendant, or its agents or servants.

"10. If you find that the gates were up and that they could have been seen from an approaching engine when five or six hundred feet away by one who had looked, and if you find that the engineer did not look, it is no evidence of negligence on the part of the defendant, or the engineer, that he did not look or did not see.

"11. If you find that the engineer saw that the gates were up when he was distant five hundred or six hundred feet, and that he then made no attempt to stop, those facts are not evidence of negligence.

"12. There is no evidence that the plank or planking was defective."

"15. If you find that the edge of the planking at the crossing wore off, or did not retain its square edge, nevertheless that is not evidence of negligence in this case.

"16. There is no evidence that the defendant was negligent in permitting (if that is the fact) one edge of the planking to become worn off, or rounded, instead of maintaining a square edge."

The judge refused to make any of these rulings as requested and submitted the cases to the jury on the first and third counts of the declarations with other instructions. The jury returned verdicts for both plaintiffs, and assessed damages in the case of the plaintiff Clapp in the sum of \$75 and in the case of the plaintiff Brennan in the sum of \$290. The defendant alleged exceptions to the refusal of the judge to make the rulings requested, to certain portions of the charge and to certain rulings as to the admission of evidence.

A. W. Blackman, for the defendant.

P. H. Kelley, for the plaintiffs.

CROSBY, J. While the plaintiff Brennan was driving a pair of horses, owned by him and attached to a wagon owned by the plaintiff Clapp, across the tracks of the defendant's railroad on Worcester Street in the town of Framingham, one of the horses caught his front hoof in a space between the planking and the rail and fell down; while in that position, the rear end of the wagon, which projected partly over the south bound main track, was struck by the engine of a train, damaging it and injuring the horses.

The cases were submitted to the jury upon the first and third counts: the first alleged negligence in failing to provide and maintain proper and suitable planking on the crossing; the third alleged that the engineer was negligent in operating the engine at an unreasonable rate of speed as he approached the crossing.

There was evidence that the distance between the rail and the planking where the horse's hoof was caught was two and a half inches; that the edge of the plank nearer the rail was worn off. "It was sloped down on the outer edge. The edge of the plank was worn down, sloughed off." The plaintiff Brennan, in describing the condition of the planking where the horse fell, said: "Well, there was a piece of plank . . . was wore down. It is some slippery like there. When the horse got her foot in there . . . and . . . her foot slipped in there between the rail and the plank, and there she caught, . . . held it in there by the toe piece." There was evidence from other witnesses that the plank was worn and rounded at the side nearest the rail. There was also evidence that the plank was so worn along the side nearest the rail for two or three feet.

The defendant was required by statute to keep in repair that portion of Worcester Street that was crossed by its railroad so that travellers would be secured a safe and easy passage across it. St. 1906, c. 463, Part II, § 112. *Harris v. Boston & Maine Railroad*, 211 Mass. 573.

The presiding judge, at the request of the defendant, instructed the jury that "It is not negligent for the defendant to maintain on a crossing a distance of two and a half inches between the plank and the rail. It is not negligence on the part of the defend-

ant to maintain that space of two and a half inches between the edge of the plank and the rail."

The evidence that the edge of the planking where the horse fell was worn and sloped down on the outer edge and was slippery, warranted a finding that it was in a defective and unsafe condition which rendered the highway unsafe for travellers, and that such defective condition could have been discovered and remedied by the defendant in the exercise of reasonable care and diligence. *Gillett v. Western Railroad*, 8 Allen, 560. *Harris v. Boston & Maine Railroad*, *supra*.

Upon the question whether the engineer was running his engine at an excessive and unreasonable rate of speed, the crossing tender testified that as soon as the horse fell upon the track, he (the crossing tender) started from his shanty on the east side of the tracks and south of the crossing and ran up the south bound track, on which the train was approaching, with a red flag to stop the train; that the distance he travelled from the shanty up the track he estimated at about three hundred and thirty feet, and that he first saw the train when he was about half way to where he stopped, that "the train was then about where Chenery's coal shed is located, which he estimated to be about two hundred and fifty feet beyond the tower," which was over eight hundred feet north of the crossing. This witness also testified that he first saw the roof of the engine cab when the engine was about at the freight house. The record shows that the freight house was about six hundred feet north of the crossing. While there were two or three freight cars on the side track about two hundred and fifty feet north of the crossing, and a curve in the track, both of which somewhat obstructed the engineer's view of the crossing, still it was a question for the jury upon all the evidence whether the engineer saw the crossing tender or in the exercise of reasonable care ought to have seen him and have stopped his train in time to have avoided the collision. *Hicks v. New York, New Haven, & Hartford Railroad*, 164 Mass. 424.

There was evidence that the train, consisting of five or six cars, each from forty to sixty feet long, was running at the rate of fifteen or twenty miles an hour when it struck the team, and was not brought to a stop until all but the last car had passed over the crossing. In view of the location of the crossing (which is de-

scribed as "a few hundred feet" from the passenger station at Framingham Centre), the speed of the train, the distance it went beyond the crossing before it stopped, and the testimony of the crossing tender, we cannot say that there was not evidence from which the jury might have found that the train was running faster than was reasonable under the circumstances.

The question whether the driver of the team was in the exercise of due care was for the jury, and the defendant does not contend to the contrary.

The evidence as to the height of the gates and whether the engineer could have seen them was admissible in connection with the other evidence upon the question whether he was running the train at an unreasonable rate of speed as he approached the crossing; and the evidence as to the speed of the train was competent for the same purpose.

We perceive no error in the action of the judge in the admission or exclusion of evidence, in the failure to give the rulings requested or in the instructions given.

Exceptions overruled.

FIDELITY AND CASUALTY COMPANY *vs.* MARY M. WITHINGTON,
trustee.

SAME *vs.* SAME.

Norfolk. February 4, 1918. — February 28, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Probate Court, Late entry of appeal, Power to vacate decree.

Under R. L. c. 162, § 13, which provides that, "If a person who is aggrieved omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case, the supreme court of probate . . . may, upon his petition and upon terms, allow an appeal to be entered and prosecuted," if a party to a proceeding in the Probate Court at the close of a hearing before the judge of that court asks to be notified in case of an adverse decision and is assured that he will receive such a notice, and thereafter a decree is entered against him of which he is given no notice, it is plain that his failure to enter an appeal from such decree within the required time is not a culpable omission or default.

Where by a decree of the Probate Court a surety on the bond of a trustee is discharged and a new bond is accepted with a new surety or sureties in a less

sum, and where more than sixteen years later the same court, upon petition, makes a decree vacating its former decree on the ground that the decree discharging the surety was obtained by false and misleading accounts of the trustee, which had been allowed by the Probate Court, and by untrue and misleading statements of the surety that most of the principal of the trust estate had been distributed according to the provisions of the will creating the trust, the surety, if he has failed without default to appeal seasonably from such vacating decree, should be granted leave under R. L. c. 162, § 13, to enter and prosecute an appeal from such decree, contesting the allegation that the accounts of the trustee were false and intended to deceive the court and the allegation that his own petition for discharge as surety was false and did deceive the court.

TWO PETITIONS filed in the Supreme Judicial Court on March 26, 1917, under R. L. c. 162, § 13, to be allowed to enter and prosecute appeals from a decree of the Probate Court for the county of Norfolk dated February 7, 1917, vacating a decree made by that Probate Court on April 6, 1900, which discharged the petitioner as the surety on the bond of William H. Drury of Waltham as trustee under the will of Francis Rupp.

The petitions were heard by *Crosby, J.*, who upon each of the petitions made a memorandum of decision containing the following statements:

"My decision allowing the petition is based upon the evidence and statements of counsel for the petitioner recited in the transcript and other statements of counsel for the petitioner made in open court and not contradicted, and particularly upon the statement of the counsel for the petitioner that after the hearing before the judge of the Probate Court had been concluded, the counsel for this petitioner stated to the judge that if a decision adverse to him was to be made he desired to be notified of such decision as he would in that event appeal from the decision so made.

"I found that the counsel for the petitioner never received any notice of the decision of the Probate Court, and I am not satisfied that any notice thereof was ever sent to the petitioner's counsel; although I have no doubt that the register of probate honestly believes that such notice was sent by him.

"I was of opinion, and so found, that the petitioner intended to claim and enter an appeal from the decree ordered in the Probate Court, and that its failure to do so was without default on its part, and that justice required that the appeals be entered, that the cases may be heard in this court."

The single justice upon each petition made a final decree that the petition be allowed; and from these decrees the respondent appealed.

R. L. c. 162, § 13, is as follows: "If a person who is aggrieved omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case, the supreme court of probate or the Superior Court, in cases in which appeals may be taken thereto, may, upon his petition and upon terms, allow an appeal to be entered and prosecuted. . . ."

C. Brewer, for the respondent.

E. C. Stone, for the petitioner.

PIERCE, J. These are appeals by the respondent from two decrees of a single justice of this court allowing the petitioner to enter late and to prosecute two separate appeals, taken by the petitioner from two separate decrees entered by the judge of the Probate Court for Norfolk County. The only question presented is, whether upon the reported facts substantial reasons require a reversal of the findings of the single justice "that the petitioner intended to claim and enter an appeal from the decree ordered in the Probate Court, and that its failure to do so was without default on its part, and that justice required that the appeals be entered, that the cases may be heard in this court."

We are of opinion the material and substantial facts of the record, however informally presented, fully support the findings. The petitioner, at the close of the hearing before the judge of the Probate Court, requested to be notified of an adverse decision and was assured it would receive such a notice. The notice was not given. It is plain the petitioner should not be held bound to have anticipated the possible non-action of the court and equally plain that its failure so to do was not a culpable omission or default.

Upon the question whether substantial justice requires a revision of the case, *Linehan v. Linehan*, 223 Mass. 297, 298, the record shows that on April 6, 1900, the Fidelity and Casualty Company filed a petition under R. L. c. 149, § 15, in the Probate Court, to be discharged as surety on the bond of one William H. Drury; that the petition purported to be signed by all persons interested; that the court discharged the surety and accepted a new bond with new surety or sureties in a less sum; that before the filing of the petition, Drury had filed and had allowed his

first, second, third, fourth, fifth and sixth accounts as trustee, purporting to represent the property received by him as trustee, together with disbursements made by him as trustee; that this decree is in force and unvacated; that December 4, 1916, the respondent filed a petition in the Probate Court to vacate the decree of April 6, 1900, discharging the Fidelity and Casualty Company as surety on the bond of Drury, for the reasons, in substance, that the fifth and sixth accounts of Drury were false and misleading, that the statements in the petition of the surety company "that 'most of the principal of the estate according to the provisions of said will' had been distributed," were untrue, misleading and tended to deceive the court; that the court was misled and deceived by these false accounts of Drury and by the false statements contained in the petition of the surety company; and that the court, relying upon the truth and accuracy of the accounts and upon the truth and accuracy of the allegations in the petition, discharged the surety on the bond.

It is manifest that the authority of the Probate Court to vacate its decree, final in its form, after sixteen years, rests upon clear proof that the decree was procured by accident or mistake or by fraud practised on the court. *Waters v. Stickney*, 12 Allen, 1. *Tucker v. Fisk*, 154 Mass. 574. *Crocker v. Crocker*, 198 Mass. 401, 404.

It is plain that the surety company should have the right to contest the allegation that the fifth and sixth accounts were false and drawn for the purpose of deceiving the court, as also the charge that the statements contained in its petition were false and tended to and did deceive the court.

Decree affirmed.

DAVID P. KIMBALL & another, trustees, vs. CHARLES E. COTTING
& another, trustees.

Suffolk. February 5, 1918.— February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Covenant to pay taxes. *Tax*, On income. *Words*, "Assessment day."

A lease of city real estate for ninety-nine years contained the following covenant: "The Lessees covenant and agree to pay and discharge any taxes or excises which during the term may on any assessment day be lawfully levied or assessed to either the Lessors or the Lessees upon or against the rent payable hereunder for or in respect of the period between such assessment day and the last prior assessment day, or for or in respect of the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income but not for any other taxes or excises in respect thereof." In an action by the lessors against the lessees on this covenant to recover the amount of the normal federal income tax on the rent, which had been withheld by the lessees, it was *held* that for the computation of the federal income tax the last day of the preceding calendar year is the "assessment day" and that the lessees were liable to pay to the plaintiffs the amount of the federal income tax imposed on the rent during the period described in the covenant, the phrase "but not for any other taxes or excises in respect thereof" referring merely to income taxes retroactively levied beyond the express limitation of the covenant.

CONTRACT by the trustees under the will of David Kimball, who as such trustees were the owners and lessors of certain real estate in Boston, against the trustees under an agreement and declaration of trust called the Kimball Building Trust, as the lessees under a lease in writing dated November 3, 1902, for the term of ninety-nine years from June 1, 1903, upon the covenants quoted in the opinion, to recover a balance of rent alleged to be due and withheld by the defendants for the payment of the normal federal income tax payable upon such rent. Writ dated January 30, 1917.

The case came on to be heard upon the pleadings and an agreed statement of facts before *Aiken*, C. J., who at the request of the parties and without making any decision thereon reported the case for determination by this court.

H. M. Davis, (R. W. Dunbar with him,) for the plaintiffs.

B. E. Eames, for the defendants.

RUGG, C. J. The question presented is whether the burden of the federal income tax on the rent reserved in a lease of real estate in Boston, of which the owners and lessors are the plaintiffs and the lessees are the defendants, must be borne by the former or by the latter. The answer to that question depends upon the words of the lease. It is dated in 1902 for a term of ninety-nine years. One of its covenants provides comprehensively that the lessees shall pay "all taxes, charges, assessments, betterments, liens" in any way assessed and levied upon or payable for or in respect of the demised premises. Another covenant upon which the decision must turn is this: "The Lessees covenant and agree to pay and discharge any taxes or excises which during the term may on any assessment day be lawfully levied or assessed to either the Lessors or the Lessees upon or against the rent payable hereunder [forty-first word] for or in respect of the period between such assessment day and the last prior assessment day, or for or in respect of the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income, but not for any other taxes or excises in respect thereof."

This covenant relates exclusively to the payment of taxes and excises levied upon the rent reserved by the lease. It concerns no other subject. It expressly includes such taxes and excises whether levied against the lessors or the lessees. It makes no difference with the scope of the covenant whether the burden is imposed by the law upon the one or the other. In either event the lessees are liable by contract of the parties, so far as that point goes. If the covenant ended with "hereunder," its forty-first word, the lessees undoubtedly would be liable.

But the covenant contains additional words. Further reference is made to "any assessment day," and the obligation assumed by the lessees to pay rent is limited by the words "for or in respect of the period between such assessment day and the last prior assessment day." It is manifest from words following in the covenant that it was the purpose of the parties to impose the obligation upon the lessee whether the tax was levied as a property or as an income tax. See in this connection *Tax Commissioner v. Putnam*,

227 Mass. 522, and cases collected at pages 531, 532. An income tax necessarily has reference to moneys received during a specified period of time. At any single moment one can hardly be said to have income. Duration of time is required for its measurement. On the other hand, a property tax requires a definite moment for its assessment, in order that its items and their value may be measured by reference to a known or ascertainable standard. Since by express words of the covenant the lessee is liable for the tax, whether levied upon the rent "as rental or income," it inevitably follows that it was the intent of the parties that the words "assessment day" were not intended to refer immutably to a single date, but were designed to include whatever period not exceeding that elapsing between two successive assessment days might be established by any tax law thereafter enacted as the measurement of the income.

The reference to the "assessment day" cannot under these circumstances be construed as referring exclusively to the first of May or the first of April, one or the other of which has been the State assessment date for a long time.

The federal income tax law here in question was approved October 3, 1913. U. S. St. 1913, c. 16, § 2. It expressly provides in paragraph D that the income tax shall be computed upon the net income "during each preceding calendar year ending December thirty-first." That fixes the last day of each calendar year as the "assessment day" for that kind of tax, as definitely as was the first day of May fixed for the year ending on that date by R. L. c. 12, § 4, cl. 4, for the State income tax in force when the lease was executed. The return to be made by the taxpayer under each law is filed at some later time, and the actual completion of the tax is made later still. But the "assessment day" is as definite under one statute as under the other, so far as it concerns a tax on income.

It is manifest that the parties intended to include both State and federal taxes by the covenant. There is no express limitation to one or the other by the words of the covenant. In its absence it would be difficult to read into the covenant such a limitation by inference. Under our Constitution and laws, in force at the time the lease was executed, a tax levied in respect of income from rents of real estate was a property and not an excise tax. *Opinion*

of the Justices, 220 Mass. 613, 623-627. *Perkins v. Westwood*, 226 Mass. 268, 276. It would seem that the federal income tax under various statutes has been regarded as an excise. See *Brushaber v. Union Pacific Railroad*, 240 U. S. 1, 17. The covenant relates to both property taxes and excises.

It had been held long before the date of the lease here in question that a federal income tax might be retroactive, and might cover a period of time and an income already taxed by another tax statute. *Stockdale v. Insurance Co.* 20 Wall. 323, 331. The extent of such retroactivity, which would be held legal, has not been determined, so far as we are aware. But the final limitation of the covenant relieving the lessee from "other taxes or excises" would bar his liability for such taxes retroactively levied beyond the express limitation of the covenant. Thus effect is given to all the words of the covenant. Although the case at bar is not governed by *Suter v. Jordan Marsh Co.* 225 Mass. 34, it falls within the same class, and is distinguishable from *Codman v. American Piano Co. ante*, 285.

Judgment for plaintiffs.

GEORGE S. HILL vs. REECE BUTTONHOLE MACHINE COMPANY.

Suffolk. February 6, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Limitations, Statute of. Contract, In writing. Practice, Civil, Setting aside inconsistent answers by jury to special questions.

In an action for a bonus or extra compensation for services rendered, the defendant pleaded the statute of limitations. It appeared that the defendant agreed to pay the plaintiff a bonus of \$1,000 if he "should succeed in improving [by] a patentable device, the defendant's 'new style' cloth buttonhole machine, so as to perfect the same and make it a success, or if he, at his option should invent and build a new patentable cloth buttonhole machine." It further appeared that the plaintiff invented an improvement on the defendant's "new style" machine which was patented more than six years before the date of the writ, and that he also invented an entirely new machine which was patented within six years before the date of the writ, and that at the time that the improvement to the defendant's existing machine was patented the plaintiff was at work on the new machine which then had not been tested. *Held*, that it could not be ruled as matter of law that, when the plaintiff's improvement on the defendant's existing machine was patented, the plaintiff exercised his option

by electing to earn the bonus of \$1,000 on that improvement, and that it was for the jury to determine on the evidence as a matter of fact, whether the plaintiff had decided upon the invention of the new machine as a fulfilment of his agreement, and that, if he had, his claim was not barred by the statute of limitations. In the case described above it appeared that the contract sued upon was an oral one, although a condensed written statement of it, which did not embody the whole of the contract between the parties, was prepared for record in the Patent Office, and it was *held*, that this written statement was not a contract in writing which precluded the plaintiff from recovering on the oral agreement. A presiding judge, who has submitted special questions to the jury, has discretionary power to set aside answers of the jury which are clearly inconsistent so that it cannot be said which of them is true without entering upon the province of the jury.

CONTRACT for \$4,000, with interest from November 29, 1902, alleged to be due to the plaintiff as extra compensation for services rendered by the plaintiff "In perfecting old machine and building new one for making buttonholes on cloth, as per agreement, \$1,000" and "For inventing and building buttonhole machine, as per agreement, \$3,000." Writ dated November 21, 1908.

In the Superior Court the case was tried before *Hitchcock, J.* The material evidence is described in the opinion.

At the close of the evidence the judge submitted to the jury ten special questions, which with the answers of the jury were as follows:

"1. Did the defendant, through Mr. Shea or Mr. Cady or either or both, at the time of the last employment of the plaintiff, agree to pay him \$1,000 in addition to his weekly salary if he, the plaintiff, should succeed in improving [by] a patentable device, the defendant's 'new style' cloth buttonhole machine, so as to perfect the same and make it a success, or if he, at his option should invent and build a new patentable cloth buttonhole machine?" The jury answered, "Yes."

"2. Did the defendant, through Mr. Shea or Mr. Cady or either or both of them, at the time of the last employment of the plaintiff, agree to pay him the sum of \$3,000, in addition to his weekly salary, if he would invent and build a patentable buttonhole machine that would not infringe any Reece patents already granted, and which would compete with a buttonhole machine that the Singer Manufacturing Company was about to build?" The jury answered, "Yes."

"3. Did the defendant by its officers agree with the plaintiff as set forth in the foregoing questions, at any time after the agreement, dated October 12, 1900, was signed?" The jury answered, "Yes."

"4. If either of said agreements were made, when were the said sums to become due and payable?" The jury answered, "February 11, 1902."

"5. Did the plaintiff make an invention that perfected and improved the 'new style' buttonhole machine so as to make it a success for working on cloth?" The jury answered, "Yes."

"6. Did the plaintiff invent and build a new cloth buttonhole machine?" The jury answered, "No."

"7. Did the plaintiff invent the idea of the machine with under needle offset from the centre of rotation, as described in the patent issued to Reece and Shea, administrators, February 11, 1902?" The jury answered, "Yes."

"8. Was the patent issued November 18, 1902, a patent for an improvement on the 'new style' buttonhole machine?" The jury answered, "Yes."

"9. Was the patent issued November 25, 1902, a patent for a new cloth buttonhole machine invented by the plaintiff in accordance with the terms of the oral agreement between the plaintiff and the defendant? The jury answered, "Yes."

"10. Was the patent issued March 24, 1903, a patent for an invention made by the plaintiff which forms a part, either by way of improvement upon or supplement to the invention for which a patent was issued November 25, 1902, so that the two inventions together make a complete buttonhole machine?" The jury answered, "Yes."

When the jury returned the answers to the questions, the judge said, "Now, Mr. Foreman, in view of your answer to the question 'If either of said agreements were made when were the said sums to become due and payable?' the answer being February 11, 1902, under the rule of law which we call the statute of limitations, it is considerably more than six years prior to the date of the writ. Therefore I ask you now to return a verdict, generally, for the defendant." The jury in accordance with this direction of the judge returned a verdict for the defendant.

The verdict was returned on October 17, 1916, and within

three days thereafter the plaintiff filed a motion to set aside the answer of the jury to the fourth question on the ground that it was not responsive to the question and on the ground that the answer was against the evidence and the weight of the evidence; and also to set aside the answer of the jury to the sixth question on the ground that the answer was against the evidence and the weight of the evidence and was inconsistent with the answer to the ninth and tenth questions. The plaintiff also filed a motion that the judge direct a verdict for the plaintiff on the answers which were responsive to the questions. A hearing on these motions was had, and later the defendant filed a motion that the answers of the jury to the first, second, third, fifth, seventh, eighth, ninth and tenth questions be set aside and disallowed on the ground that the answers and findings were against the evidence and the weight of the evidence. The judge granted the plaintiff's motion to set aside the answers to the fourth and sixth questions, and denied the plaintiff's motion that a verdict be ordered on the answers of the jury in the sum of \$4,000 with interest from November 29, 1902, and on the same day, on the defendant's motion mentioned above to set aside the answers to various questions, on which no hearing ever was had, the judge set aside the answers of the jury to the ninth and tenth questions, and allowed to stand the answers to the first, second, third, fifth, seventh and eighth questions. In rendering his decision on these motions the judge filed the following memorandum:

"In this case three motions have been filed, as follows:

"1. Motion by the plaintiff to set aside the answers of the jury to questions 4 and 6.

"2. Motion by the plaintiff to set aside the verdict ordered by the court and to direct a verdict for the plaintiff.

"3. Motion by the defendant to set aside the answers of the jury to questions 1, 2, 3, 5, 7, 8, 9 and 10.

"The answers of the jury to question 4 cannot be true, as the only claim made by the plaintiff was that he was entitled to the sums claimed only after both inventions had been made and patents issued thereon, and it was admitted that only one patent had been granted on February 11, 1902. The answer was also not responsive to the question, as it was intended by the court to be propounded.

"The answer to question 4 should be set aside for the reason given, and it is so ordered.

"The answer to question 6 is clearly inconsistent with the answers to questions 9 and 10. Manifestly both cannot be true, and it is impossible to say which should stand without trenching on the province of the jury. The answers to questions 6, 9 and 10 should be set aside for the reason given, and it is so ordered.

"There was evidence which would justify the jury in finding as they did in answers to the remaining questions, to the effect that an agreement was made between the plaintiff and the defendant as claimed by the plaintiff and that the plaintiff under said agreement invented the idea for the machine for which a patent was granted on February 11, 1902, to Reece and Shea, administrators, and also made the invention that perfected and improved the 'new style' buttonhole machine so as to make it a success for working on cloth, for which a patent was granted on November 18, 1902. The answers to questions 1, 2, 3, 5, 7 and 8 should stand, and it is so ordered.

"There were but two principal issues in the case and upon which it was tried.

"1. Was the agreement made between the parties as claimed by the plaintiff?

"2. Is the action barred by the statute of limitations?

"The general verdict was ordered by the court in the following language: [as quoted on page 546.]

"The answer of the jury to the question referred to being set aside, I am still of the opinion that the answers which are not set aside justify the ordering of the verdict for the defendant, and that the plaintiff's action is barred by the statute of limitations.

"The motion of the plaintiff to set aside the verdict ordered by the court and to direct a verdict for the plaintiff is therefore denied.

"In so far as discretion is a factor in passing upon these motions, the foregoing orders are made in the exercise of such discretion as well as for the reasons given."

The plaintiff alleged exceptions.

J. Cavanagh, (I. C. Hersey with him,) for the plaintiff.

S. L. Whipple & L. Withington, for the defendant.

DE COURCY, J. The plaintiff seeks to recover \$4,000, extra compensation in the nature of bonuses, for services rendered to

the defendant in inventing certain patentable buttonhole machines. It is settled by the answers of the jury that the defendant agreed to pay him \$3,000, in addition to his weekly salary, if he should invent and build a buttonhole machine on mechanical principles different from those embodied in the Reece patents; also that it would pay him a bonus of \$1,000 if he should improve the defendant's "new style" buttonhole machine so that it would work successfully on cloth, — or (at his option) should build them an entirely new cloth buttonhole machine. And there was evidence that neither of these sums should be payable until both patents were granted.

The plaintiff built a buttonhole machine different in principle from the Reece machines; and a patent therefor was issued to Reece and Shea, administrators, February 11, 1902. On November 18, 1902, a patent was issued for improvements in the "new style" machines, on an application filed on February 20 of that year. The plaintiff had filed an application earlier, namely on February 5, 1902, for a patent on an entirely new cloth buttonhole machine; but the patent was not issued until November 25, 1902, and a supplemental patent not until March 24, 1903.

One of the questions submitted to the jury was, "4. If either of said agreements were made, when were the said sums to become due and payable?" and they answered "February 11, 1902." As that was more than six years before the date of the writ (November 21, 1908), the judge directed a verdict for the defendant, based on the statute of limitations. Later, on the plaintiff's motion, the answer to question 4 was set aside; but the judge allowed the verdict for the defendant to stand.

The main question before us is, whether there was error in ordering a verdict for the defendant. If the plaintiff's cause of action accrued on November 18, 1902, when the patent was issued for improvements in the "new style" machine, the statute had barred the claim three days before the writ was brought. But the plaintiff had the election of earning the \$1,000 by either inventing an improvement in the "new style" machine, or inventing the entirely new machine, which was not patented until November 25, 1902, and March 24, 1903. And it cannot be said as matter of law that he had made an election. He was testing the new machine in the experimental room on the Monday before

the Saturday (November 29, 1902,) when he left the defendant's employ; and the defendant's treasurer then expressed an opinion that it could not be bought for \$250,000. On the evidence it was for the jury to determine, as matter of fact, whether the plaintiff had decided upon the invention of the new machine as a fulfillment of his agreement; and, if he did, his claim was not barred by the statute of limitations.

The defendant argues also that the written agreement of October 12, 1900, precludes the plaintiff from recovering upon the oral agreement. But there was evidence that this written agreement was not intended to embody all the contract between the parties, and was only prepared for record in the Patent Office.

On the motion of the plaintiff, the judge set aside the answer of the jury to the fourth question as unwarranted and not responsive. As the answer to the sixth question was clearly inconsistent with the answers to the ninth and tenth questions, and it could not be said which was true without entering upon the province of the jury, the judge properly set aside the three answers. This action was within the discretionary power of the court, even upon its own motion. *Reilly v. Boston Elevated Railway*, 206 Mass. 53. *Edwards v. Willey*, 218 Mass. 363, 367.

As there was error in directing a verdict for the defendant, the entry must be

Exceptions sustained.



EDWARD B. FEASTER vs. FEASTER FILM FEED COMPANY
& others.

Middlesex. January 7, 8, 1918. — March 1, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, Specific performance. Equity Pleading and Practice, Parties.

In a suit in equity to enforce the specific performance of an agreement to reconvey and reassign to the plaintiff licenses under certain patents, the defendants filed in court an assignment to the plaintiff of the licenses in question subject to the terms of a certain agreement with a person who was not made a party to the bill, but the plaintiff refused to accept any other than an unconditional

assignment. The trial judge found that the person with whom this agreement was made had in good faith advanced \$25,000 upon the security of the licenses in question. He refused to make a decree for specific performance by ordering the defendants to make an unconditional assignment of the licenses in the absence as a party to the bill of the person with whom the agreement was made, and said that, if such person should be made a party, he would not grant an order for specific performance without protecting the rights of such person in the property to be assigned. He made a decree dismissing the bill. *Held*, that the decree was right.

BILL IN EQUITY, filed in the Superior Court on July 8, 1916, by Edward B. Feaster, the alleged owner of a certain application for letters patent for improvements in apparatus for unwinding motion picture films and of a license under other letters patent granted to him by one Gillespie, against the Feaster Film Feed Company, a corporation, the Byron Chandler, Incorporated, a corporation, and Byron Chandler, (Fannie M. Chandler, the mother of Byron Chandler, who is mentioned in the opinion, not being made a party to the bill,) seeking to enforce specifically an alleged agreement of the defendant Byron Chandler to reconvey and reassign to the plaintiff the rights and license under the letters patent mentioned.

The case was heard by *Hardy, J.* The material evidence is described in the opinion. The judge made the following memorandum of decision:

"I find the allegations of the bill, so far as admitted in the answers, have been sustained. I find the allegations under the 5th, 6th, 7th, and 9th sections of the bill have been sustained. I find the defendants gave and sent the notice in the manner required by the agreement as set forth in section 10 of the answer. I find that Byron Chandler is not the owner of the patent and license set forth in the bill, but the title at the present time appears to be in the defendant, the Feaster Film Feed Company, Inc., and Fannie M. Chandler, in accordance with certain agreements as referred to in section 13 of the answer. I find that the said Byron Chandler borrowed or received \$10,000 from his mother, Fannie M. Chandler, for the first instalment due for said patent, etc., under the agreement. I find that the incorporation of said companies was made to assist in the promotion of the manufacture and sale of stock to develop said patent; that it became necessary in such promotion and development to obtain money; that through the influence of her son, said Fannie M. Chandler advanced by

way of a loan the sum of \$25,000 in various instalments on or before the date of the agreement set forth in copies 'A' and 'B' referred to in section 13 of the answer; that the said Fannie M. Chandler advanced the money in good faith as a loan, and in like good faith received such agreements as security for said loans without any participation in a fraud upon creditors. I find there was no fraudulent intent or conspiracy, as charged in the argument upon the evidence, practised by the defendants in obtaining the loan and executing the agreement securing such loan.

"Nothing appeared in evidence to show that the money advanced by Mrs. Chandler was expended for any other purpose than the development of the patent or the manufacture of the machines under the same. Nothing was disclosed to show that the plaintiff was ignorant of the fact of the expenditure of money for such purposes.

"I find the defendants made a tender to the plaintiff of a performance of the agreement as set forth in section 14 of the answer, to which reference is made in copy 'C' thereto annexed. The plaintiff declined to accept such tender. I find that Mrs. Fannie M. Chandler has a valid interest in such property as security for her loan.

"The plaintiff is not entitled to specific performance as a matter of right in this situation in the absence of Mrs. Chandler as a party to the bill. If she were a party to the bill, acting upon a reasonable discretion, I am of the opinion that I should not grant specific performance without protecting Mrs. Chandler's interest as mortgagee in the property.

"Bill is dismissed."

The plaintiff made the following requests for findings:

"1. That Mrs. Fannie M. Chandler advanced no money to the Feaster Film Feed Company except one payment of \$5,000.

"2. That Mrs. Fannie M. Chandler did advance money to her son Byron Chandler, and that Byron Chandler in turn advanced money to Byron Chandler, Incorporated.

"3. That this money was advanced to Byron Chandler and some of it was indorsed by him to Byron Chandler, Incorporated, and all of it was advanced prior to May 1, 1916, the date on which the alleged assignment to Mrs. Chandler was executed.

"4. That Byron Chandler, as shown by the statements in his

letters to the plaintiff, considered the money which he had paid to Byron Chandler, Incorporated, his own money and that it was, in fact, his own money.

"5. That the alleged assignments to Mrs. Fannie M. Chandler were voluntary and were made at a time when the Feaster Film Feed Company was largely in debt.

"6. That by these alleged assignments the Feaster Film Feed Company conveyed away all of the property used in doing business.

"7. That the authorization to execute these assignments was voted in a private meeting of two of the three directors.

"8. That neither of these assignments was ever recorded, either as a bill of sale or as a mortgage of personal property."

Upon these requests the judge made a memorandum of further findings of fact as follows:

"As to the requests for findings filed by the plaintiff in the re-argument I can only say on the first request that it is impossible for me to distribute the specific sums advanced to each of the separate corporations. The corporations were organized about the same time, one being identical with the other so far as membership was concerned, and one being called the holding corporation. I find the money was advanced by Mrs. Chandler for the benefit and promotion of the enterprise in which both corporations were interested.

"I find the money advanced by Mrs. Chandler passed through the hands of Byron Chandler to the corporation or corporations named in the second and third requests, and at the times named therein, but it was not advanced on the personal credit of Byron Chandler.

"I deny the fourth request.

"I find the advances made by Mrs. Chandler were made at the request of Byron Chandler at a time when the Feaster Film Feed Company was largely in debt, but there was no evidence before me that Mrs. Chandler knew of any other indebtedness except what was due herself.

"I make the findings asked for in the sixth, seventh and eighth requests."

By order of the judge a final decree was entered that the bill be dismissed. The plaintiff appealed.

F. J. V. Dakin, for the plaintiff.

Lee M. Friedman, for the defendants.

PIERCE, J. This is a bill for specific performance of a contract dated October 17, 1914, whereby Byron Chandler, in the event of his election not to make either of two stipulated payments as provided in the contract, agreed to reconvey and reassign to the plaintiff, Edward B. Feaster, an assignable license under Patent No. 921537 and a patent under Letters Patent No. 1116580, together with all models, drawings, designs, dies, tools, contracts licensing or letting machines under said patents, and all trade marks and trade names used in connection with the aforesaid patents or machines manufactured thereunder, subject to all rights and licenses, leases and agreements theretofore issued or made by Chandler, "his representatives or assigns."

On the payment of \$10,000, contemporaneously with the execution of the contract and subject thereto, Chandler acquired all the right, title and interest of the plaintiff in and to an application for a patent, serial No. 744970 (patent No. 1116580), and all the right, title and interest of the plaintiff in and to a certain license dated November 17, 1913, granted by Charles B. Gillespie under Letters Patent No. 921537. On March 12, 1915, Chandler assigned, transferred and set over unto "Byron Chandler Inc., its successors and assigns, all the right, title and interest secured to me by an assignment of Edward B. Feaster under date of October 17, 1914, and recorded in the United States Registry of Patents." On March 12, 1915, Byron Chandler, Inc. conveyed all the right, title and interest secured to it by the assignment of Byron Chandler of even date, to the Feaster Film Feed Company.

The agreement between Feaster and Chandler provided that Chandler "at any time after the date of this agreement shall have the full right, power and authority, anything herein to the contrary notwithstanding, to grant licenses and leases of, or exclusive territorial rights to and for, and make all kinds of agreements in respect of, or otherwise deal in and with said Feaster invention and application therefor, and any letters patent that may be issued thereon, freely and unreservedly, except that the party of the third part [Byron Chandler] shall not at any time prior to the making of both payments specified in paragraph 'Eighth' of this agreement, have any right or authority to make any abso-

lute assignment or grant any exclusive license of said invention, patent application or letters patent, except subject to the terms and provisions of this agreement. Such agreements, leases, licenses, territorial rights, etc., herein provided for may be made and granted to cover the entire life of the patent, or such part thereof as the party of the third part, his representatives and assigns, may determine.

"No licensee, lessee, grantee, or person or corporation making any agreement with the party of the third part [Byron Chandler], his representatives or assigns, with respect to said invention, patent application or letters patent, shall be required to ascertain or determine that any of the obligations of this contract are performed or carried out by any of the parties hereto, but shall be free to deal with the party of the third part, his representatives and assigns, as having absolute authority and right to grant such rights under said invention and letters patent."

On May 1, 1916, the Feaster Film Feed Company executed and delivered to Fannie M. Chandler, two instruments to secure the repayment of money advanced "in various instalments" by her "for the benefit and promotion of the enterprise in which both corporations were interested." The trial judge found as a fact that the money was advanced "in good faith as a loan," and that she in good faith received the agreements as security for the loan without any participation in a fraud upon creditors. The first of these instruments is "a license under the Feaster patent and under the Gillespie patent, the license to remain in full force and effect until the sum of twenty-eight thousand dollars due Mrs. Chandler from the Feaster Film Feed Company and Byron Chandler, Inc., had been paid. The second instrument was in the form of a bill of sale transferring all of the dies, models, drawings, designs and machines set forth in a schedule annexed, which property Mrs. Chandler was to hold as security for the repayment on or before May 1st, 1917, of the said sum of twenty-eight thousand dollars. This instrument stipulated that the Feaster Company should retain in its possession all the property conveyed until May 1st, 1917, and on that date Mrs. Chandler should have the right to sell the property and apply the proceeds to the amount of indebtedness remaining unpaid."

On May 23, 1916, there was due to be paid under the agree-

ment between Feaster and Chandler \$15,000. Before this became payable Chandler notified Feaster that he elected not to make the payment. On May 24, 1916, the plaintiff demanded of Chandler a reassignment of the Letters Patent No. 1116580 and the license under patent No. 921537, and notified him "of his intention to take over all models . . . manufactured under said Patent. . . ."

After the bill was filed the defendants made a tender to the plaintiff of all these rights, title and interest in the patent and license in pursuance of the agreement of October 17, 1914, but "subject specifically to the terms of a certain agreement made and entered into by us or either of us with one Fannie M. Chandler, on or about the 1st day of May, 1916." The plaintiff refused to accept any other than an unconditional conveyance, and thereupon the assignment was placed in the custody of the court.

It is the contention of the plaintiff that the title was in Chandler absolutely on May 23, 1916, because the instruments of conveyance to the corporations did not in formal words transfer the title subject to the provisions of the agreement; and because it was the clear intent of that agreement that the business should not be divided between the owner of the license and the owner of the patent right. As to the first of these grounds, we think it entirely clear that the corporations took title to the patent "subject to the terms and provisions of this agreement" because they took the right, title and interest of Chandler which, in terms, were subject to the agreement, and because each corporation had actual knowledge of the agreement and of its obligations. As to the second ground, the presiding judge found as a fact upon unreported evidence that the "license set forth in the bill . . . appears to be in the defendant, the Feaster Film Feed Company, Inc., and Fannie M. Chandler." It is true the record does not show any specific formal transfer and assignment of the license from Chandler to the Feaster Film Feed Company, but that fact may be inferred properly from the fact that on behalf of that company, as president, Chandler executed the agreement with Mrs. Chandler which in terms licensed the use of the patent and the license for the Gillespie patent.

If it be held, as we think it should be, that the patent and license were vested in the corporations subject to the terms of the agreement, the plaintiff contends that the Feaster Film Feed

Company had no authority under that agreement to mortgage or incumber the patent and license other than by issuing licenses and territorial rights in the ordinary course of business. The mere findings that the assignments "conveyed away all of the property used in doing business" and were "voted in a private meeting of two of the three directors," without a statement of other facts and circumstances are not sufficient to overcome the specific finding that "there was no fraudulent intent or conspiracy . . . practised by the defendants in obtaining the loan and executing the agreement securing such loan." Nor do we think the mortgages void as a matter of law because it may be inferred that Chandler, and therefore the corporation, knew that the installment to become payable May 23, 1916, would not be paid, and that the result of the mortgages would be to retain control of the patent and license in the corporation in spite of the agreement.

We are of opinion the conveyances to Mrs. Chandler were authorized by the agreement between Feaster and Chandler. It follows that the decree dismissing the bill should be affirmed with costs. *Curran v. Holyoke Water Power Co.* 116 Mass. 90. *Thaxter v. Sprague*, 159 Mass. 397.

Decree accordingly.

ESSEX LUNCH, INCORPORATED, vs. BOSTON LUNCH COMPANY.

Suffolk. February 4, 1918. — March 1, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Landlord and Tenant. Covenant, In lease. Equity Jurisdiction, To restrain alteration of leased building in violation of covenant.

In a suit in equity by the assignee of the rights of the sublessor under a sublease in writing to the defendant of a store on the ground floor of a building which was leased to such sublessor by its owner, to enjoin the defendant from cutting an opening in the partition wall between the leased store and an adjoining store in the next building, it appeared that by the terms of the lease the defendant covenanted "to keep the said leased premises in such repair, order and condition as the same are in at the commencement of the said term" and "not to make or permit to be made any alteration or addition to the said leased premises, nor permit any hole to be made or drilled in the stone or brickwork of the said building, . . . except such and in such place and manner as shall have been

first approved in writing by the Lessor." It further appeared that the owner of the building also owned the next building, which also had a store on the ground floor, and gave the defendant permission in writing to cut an opening in the partition wall for the purpose of connecting the two stores, and that the defendant proceeded to cut such an opening although forbidden by the plaintiff to do so. *Held*, that the owner of the building had no power to authorize the defendant to violate the obligations of his covenant in the sublease from the plaintiff's assignor, and that the plaintiff was entitled to an injunction.

BILL IN EQUITY, filed in the Superior Court on October 6, 1917, by the assignee and holder of the sublessor's interest in a sublease of the store on the ground floor and the rear half of the basement of the building numbered 17 on Essex Street in Boston, the lease having been given to the defendant by Bert A. Kelsey, described in the lease as a corporation, which afterwards assigned its interest as lessor to the plaintiff, to enjoin the defendant from proceeding further in cutting an opening in the partition wall between the leased premises and the building numbered 19 and 21 on Essex Street, praying also that the defendant be ordered to replace the wall in the condition in which it was at the beginning of the term of the lease, also for damages and for further relief.

The defendant's answer, among other matters, contained the following paragraph: "4. All the real estate heretofore described numbered 17, 19 and 21 on said Essex Street are owned and have been for sometime past by the Atherton Brown trustees, who have given their written consent to the opening in the wall above described, and said work has been done in the usual way by application being made to the building department of the city of Boston, and the work in all respects has been completed in accordance with law, and that no additional risk has been caused by said work, and that because of the consent of the owner of the building obtained as aforesaid, no breach has been thereby affected in the lease to said Kelsey from the owners of said building."

In the Superior Court the case was heard by *J. F. Brown, J.* The material facts are stated in the opinion. The judge made the memorandum of decision which is quoted in full in the opinion. By order of the judge a final decree was entered that the bill be dismissed with costs; and the plaintiff appealed.

The case was submitted on briefs.

C. C. Barton, Jr., & R. E. Harding, for the plaintiff.

A. C. Webber, for the defendant.

PIERCE, J. Bert A. Kelsey, the lessee under a written lease, let the entire premises to the defendant for the remainder of his term, reserving the right to re-enter on breach of any of the covenants "and repossess the same as of the Lessor's former estate," and then assigned all his interest in the lease to the plaintiff. The lease to the defendant was an underlease and not an assignment. Before the assignment to the plaintiff, Kelsey had a substantial interest in the premises underlet to the defendant; he had the right to use and enjoy the premises let to the defendant for the remainder of the term, upon a surrender or forfeiture of the sublease for any breach of covenant; and this interest passed to the plaintiff by Kelsey's assignment. *Patten v. Deshon*, 1 Gray, 325. *McNeil v. Kendall*, 128 Mass. 245. *Dunlap v. Bullard*, 131 Mass. 161. *Collins v. Hasbrouck*, 56 N. Y. 157. *Doe v. Bateman*, 2 B. & Ald. 168.

It is admitted by the defendant, or not denied, that it leased the adjoining premises and thereby acquired the occupancy of the stores situated on the ground floors of both buildings. These stores were separated from each other by a partition wall, which was the dividing wall between the two buildings. With the written consent of the owner of both buildings, but against the protest of the plaintiff and in defiance of a notification of the plaintiff that under no circumstance could said wall be broken or any portion thereof removed, the defendant cut an opening eight to ten feet in length in the partition wall for the purpose of connecting both stores. The suit was heard before a judge of the Superior Court who filed a memorandum in these words: "The owner of the two buildings having given permission, in writing, to cut the hole in the wall between the two buildings, this bill is dismissed with costs."

The plaintiff, as assignee of the lease which Kelsey had given to the defendant, acquired a property interest in the leased premises which enabled him to maintain an action at law to recover damages for injury to that interest or a suit in equity to restrain the doing of acts which amount to waste, which, as defined in *Delano v. Smith*, 206 Mass. 365, 370, "is an unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in

such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any wilful or negligent act." "The test in such a case is not alone whether a material injury is done to the building, but whether it is altered in a material manner, and to an extent beyond what is fairly implied from the terms of the original contract of letting." *Klie v. Von Broock*, 11 Dick. 18, 29. Tried by this rule, the owner of the premises by his assent could confer no right upon the defendant without the permission of the plaintiff to violate the obligations which it assumed by its covenant "to keep the said leased premises in such repair, order and condition as the same are in at the commencement of the said term" and "not to make or permit to be made any alteration or addition to the said leased premises, nor permit any hole to be made or drilled in the stone or brickwork of the said building, . . . except such and in such place and manner as shall have been first approved in writing by the Lessor."

It follows that the decree dismissing the bill must be reversed with costs; and it is

So ordered.

IRVING AND CASSON — A. H. DAVENPORT COMPANY & others vs.
AUGUSTINE J. HOWLETT & others.

Suffolk. February 7, 1918. — March 1, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contempt. Equity Pleading and Practice, Temporary injunction.

In proceedings for contempt for violation of a temporary injunction in a suit in equity the merits of the suit in which the injunction was granted are not involved and are not open for examination.

In proceedings for contempt for violation of a temporary injunction in a suit in equity where the court has jurisdiction of the subject matter and the parties the only question open is whether the order of the court has been disobeyed, and there can be no hearing in the contempt proceedings of the question whether or not the injunction is broader than the bill warrants or to determine whether on a final hearing the injunction should be dissolved.

BILL IN EQUITY, filed in the Superior Court on June 23, 1916, by twelve corporations and the members of five partnerships and

an individual person all engaged in the business of the manufacture and sale of lumber used by builders and carpenters for the inside finish of buildings in process of erection, and owning and operating woodworking mills in the city of Boston and its vicinity adapted and devoted to such manufacture, against certain officers and members representing the Carpenters' District Council, of Boston and Vicinity of the United Brotherhood of Carpenters and Joiners of America, to enjoin the members of that council among other restraints, from combining and conspiring in any way to prevent the use and sale of the plaintiffs' material by and to such persons as might desire to purchase and use them and from threatening in any way any person or persons who desired to use the plaintiffs' products that the use of such products would cause them labor troubles or loss of any kind.

The granting of a temporary injunction and the contempt proceedings for its alleged violation are described in the opinion.

The petition of the plaintiff J. H. Gerlach Company praying that the defendants Twomey, White and Feeley be attached for contempt of court was heard by *Fox, J.*, upon the master's report and exceptions thereto. The judge overruled the exceptions and confirmed the report. He found the respondents Twomey and Feeley guilty of contempt and the respondent White not guilty, and sentenced the defendant Twomey to pay a fine of \$200 and the defendant Feeley to pay a fine of \$100. But, since it was contended that upon the facts found by the master the acts of the respondents acting as agents of the Carpenters' District Council of Boston and Vicinity of the United Brotherhood of Carpenters and Joiners of America, in calling off their men from a building where non-union trim was to be used, were lawful and that therefore no violation of the injunction was shown, the judge suspended the sentences and reported the case for determination by this court upon the pleadings, the stipulations, the interim decree of injunction, the petition for attachment for contempt, the master's report and the exceptions thereto, the exceptions, as stated in the opinion, being waived at the argument before this court.

J. M. Hallowell, (*L. A. Mayberry* with him,) for the respondents.

E. A. Whitman, for the petitioners.

PIERCE, J. On July 20, 1916, the defendants Twomey and Feeley and others named in the bill of complaint, after hearing,

were restrained until further order of the court from "taking any aggressive action against the plaintiffs or any of them or against any contractors or builders using the products of the plaintiffs. . . ." On August 1 and 9, 1917, one of the plaintiffs, J. H. Gerlach Company, filed a petition in the Superior Court that the defendants Joseph F. Twomey, John T. White and J. Feeley be attached for contempt for violation of the said injunction. The petition was referred to a master to find the facts and report to the court. Hearings were duly held before the master and he filed his report in the Superior Court on November 30, 1917. The evidence before the master is not reported and all exceptions to the report were waived at the hearing before this court. As conclusions of fact resulting from the reported subsidiary facts, the master found that "what the respondents did as above set forth was in covert violation of the injunction of July 20, 1916, and also in covert violation of the stipulation of December 18, 1916." The findings of fact and conclusions of fact based on evidence which is not reported cannot be disturbed and are not reviewable by this court. *Craig v. Warner*, 216 Mass. 386, 393.

In the Superior Court upon the petition coming on to be heard the trial judge overruled the exceptions and confirmed the report of the master, and thereupon found the respondents Twomey and Feeley guilty of contempt, and the respondent White not guilty; and sentenced the respondents Twomey and Feeley to pay a fine. The judge suspended the sentences and reported the case to this court because of the contention of the respondents "that upon the facts found by the master the acts of the respondents . . . in calling off their men from a building where non-union trim was to be used, were lawful and that therefore no violation of the injunction was shown."

Upon proceedings for contempt it is the generally accepted rule that the only inquiry is whether the court granting the injunction had jurisdiction of the subject matter and the parties, and whether the order has been violated. The merits of the original cause are not involved and are not open for examination. *Hamlin v. New York, New Haven, & Hartford Railroad*, 170 Mass. 548. Nor can there be a hearing to determine whether or not the injunction is too broad or whether on final hearing the injunction should be dissolved. The only remedy is an application to the

trial court for a modification or construction of its order, if the defendants be advised that the order is broader than the bill of complaint warrants. So long as the order stands unrevoked or unmodified, it is the duty of the defendants enjoined to observe and obey the order implicitly. High on Injunctions, (4th ed.) 1416, and cases there collected. In the case at bar the Superior Court had jurisdiction of the subject matter and of the parties, and it is admitted that it made the order during the pendency of the action in which it was allowed. Its purpose was to hold matters *in statu quo* pending the litigation between the parties to the suit. It was the plain duty of the respondents while the order was in force to obey it. It results that the judgments of the Superior Court must be affirmed.

So ordered.

ALICE L. BLAISDELL *vs.* INHABITANTS OF STONEHAM.

Middlesex. January 7, 1918. — March 2, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Municipal Corporations. Public Officer. Watercourse.

Where the superintendent of streets of a town, having under R. L. c. 25, §§ 85, 86, the powers and duties of surveyors of highways, for the purpose of diverting surface water from a public street into a culvert, without any vote of the town on the subject, placed in the street catch basins and gratings, which by the diversion of the surface water into the culvert caused a brook, that was a natural watercourse, to overflow upon the land of a private owner and injure his property, such landowner has no remedy against the town, because the superintendent of streets in diverting the surface water to make the street reasonably safe and convenient for travel was performing his duties as a public officer and was not acting as an agent, officer or employee of the town.

TORT against the town of Stoneham for the alleged unlawful flooding of the plaintiff's land on Waverly Street in that town. Writ dated August 19, 1914.

In the Superior Court the case was tried before *Fessenden, J.* The material facts shown by the evidence are stated in the opinion. The bill of exceptions contained the following statement: "It was agreed that the original basins, which caused the damage complained of, were put in by the town in or about the year 1907

although no vote specifically authorizing their installation appears in the town records."

At the close of the evidence the judge made the following statement:

"No question is made that Mr. Sprague in 1891 was superintendent of streets appointed by the selectmen. No question is made that there was a superintendent of streets appointed by the board of public works, created by St. 1902, c. 263, who succeeded to the rights, duties and liabilities of the selectmen in the matter of highways and drains, so whether this grating was put in in eighteen ninety-one or nineteen hundred and seven, that it was done by the superintendent of streets either in repairing or caring for the streets."

The judge ordered a verdict for the defendant, but first permitted the jury to assess the damages in case the plaintiff was entitled to go to the jury. The jury assessed such damages in the sum of \$300, and then by order of the judge returned a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

S. L. Whipple, W. R. Sears & H. W. Ogden, for the plaintiff.

H. H. Richardson, for the defendant.

CARROLL, J. The plaintiff is the owner of real estate on the westerly side of Waverly Street in Stoneham. High Street is north of the plaintiff's land. To the north and east of her property there is a rising grade for a distance of one half to three quarters of a mile; and a brook, flowing in a westerly direction through the lands of various owners into a culvert under Waverly Street, enters the plaintiff's premises. Originally, the street drainage from Waverly and High Streets was carried through gutters on both sides of Waverly Street past the plaintiff's estate to another brook on Elm Street. In 1907 openings were made in the culvert through which the brook flows under Waverly Street and iron gratings were placed in the gutters which turned the water into the culvert. This action is for damages caused by the diversion of the surface water causing the brook to overflow its banks, fill up the pond on the plaintiff's land and in other ways injure her property.

We must assume from the agreed statement of facts and the evidence, that the work of opening the culvert and placing the

catch basins or gratings, was done by, or, by the authority of, the board of public works of Stoneham (St. 1902, c. 263); which board had the care of highways, drains and catch basins, with the powers and duties of surveyors of highways. R. L. c. 25, §§ 85, 86.

An officer charged with the duties of a surveyor of highways is a public officer, and not an agent of the town. In diverting the surface water from Waverly Street into the culvert, he was doing a public work and was in the performance of his duty in keeping the street reasonably safe and convenient for travel. He was not an agent, employee or officer of the town in doing this work, the relation of principal and agent did not exist between him and the defendant, — he was executing a public duty as a public officer, — and for his acts the town is not responsible. *Dupuis v. Fall River*, 223 Mass. 73, and cases cited.

An action of tort at common law will not lie against a city or town for diverting the surface water from its streets in order to keep them safe, and causing it to flow upon adjoining premises, even when the surface water is drained into a culvert or water-course. The remedy is under the statute. R. L. c. 51, § 15, now St. 1917, c. 344, Part IV, § 21. *Woodbury v. Beverly*, 153 Mass. 245. *Brainard v. Newton*, 154 Mass. 255. *Holleran v. Boston*, 176 Mass. 75.

It does not appear that the town ever took any action with respect to the gutters, the culvert or the catch-basins; and no vote specifically authorizing their installation appears in the town records. See *Smith v. Gloucester*, 201 Mass. 329; *Dupuis v. Fall River*, *supra*; *Lead Line Iron Pipe Co. v. Wakefield*, 223 Mass. 485; *Bolster v. Lawrence*, 225 Mass. 387, 389, 390. The town did not assume to perform the work by means of its agents, as in *Waldron v. Haverhill*, 143 Mass. 582, *Butman v. Newton*, 179 Mass. 1, and the construction of the gutter and catch basins for the drainage of surface water into the brook, did not make it a sewer or drain under R. L. c. 49. Cases like *Bates v. Westborough*, 151 Mass. 174, and *Diamond v. North Attleborough*, 219 Mass. 587, are not applicable.

According to the terms of the report, judgment is to be entered for the defendant.

So ordered.

LOREN D. TOWLE vs. MARY S. WINGATE.

Middlesex. January 11, 1918. — March 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Partition. Devise and Legacy.

A testatrix by her will gave to her two nieces, Sarah and Mary, "the use of my homestead . . . including buildings and one acre of garden . . . to have the use of all, free of rent; and I direct my executors to pay all expenses of estate . . . from the income of funds in their possession, all taxes, assessments, insurance and all proper repairs upon the estate so given, at an expense, however, not to exceed two thousand dollars in any year, any additional expenditures thereon to be made by said Sarah and Mary, or whichever of them shall occupy said homestead estate; should neither said Mary or Sarah wish to occupy said estate, the same shall be sold by my executors, and the proceeds thereof revert to the residue of my estate." She also gave to the two nieces "the contents of the buildings of said homestead," but the furniture, pictures, ornaments and books were not to be removed from the house "except by their mutual consent . . . so long as either of them shall occupy it." Both nieces occupied the homestead until one of them ceased to do so and made a deed to a third person of all her interest in the homestead and such person brought a petition for partition against the other niece, who continued to live in the homestead, which was a one family house. *Held*, that the petition must be dismissed, as the right to use the house was not transferable, it having been the intention of the testatrix that the possession of the house should not be interfered with as long as either of her nieces wished to use it.

PETITION FOR PARTITION, filed in the Superior Court on June 5, 1917, as described in the opinion, of a certain parcel of land with the buildings thereon in Newton, alleging that the petitioner is the owner of a life estate in an undivided half of the property.

The respondent's answer, among other matters, alleged that the respondent is entitled to the entire possession and exclusive occupancy of the property during the term of her natural life.

The case was heard by *Aiken*, C. J., without a jury. The facts are stated in the opinion. The Chief Justice made the rulings requested by the respondent and refused to make certain rulings requested by the petitioner. He made an order that the petition be dismissed; and the petitioner alleged exceptions.

T. W. Proctor, (*H. T. Richardson* with him,) for the petitioner.

F. M. Forbush, for the respondent.

CARROLL, J. The petitioner asked for the partition of a tract of land in Newton, formerly owned by Mary Shannon. In the Superior Court the petition was dismissed. The case is here on the petitioner's exceptions to the judge's rulings and refusals to rule.

Mary Shannon in the fifth paragraph of her will gave to her nieces (the respondent and her sister Sarah), "the use of my homestead in said Newton, including buildings and one acre of garden, . . . to have the use of all, free of rent; and I direct my executors to pay from the income of funds in their possession, all taxes, assessments, insurance and all proper repairs upon the estate so given, at an expense, however, not to exceed two thousand dollars in any year, any additional expenditures thereon to be made by said Sarah and Mary, or whichever of them shall occupy said homestead estate; should neither said Mary or Sarah wish to occupy said estate, the same shall be sold by my executors, and the proceeds thereof revert to the residue of my estate." In the sixth paragraph of the will the respondent and her sister Sarah were given "the contents of the buildings of said homestead;" but the furniture, pictures, ornaments and books were not to be removed from the house "except by their mutual consent . . . so long as either of them shall occupy it."

In May, 1916, the petitioner purchased from the executors of the will of Mary Shannon approximately twenty-nine and one half acres of land, which included the tract of land of which partition is sought in this proceeding. The deed was "subject to the tenancy of Sarah Pearson Wingate Taylor and Mary Shannon Wingate" in the premises described in the petition, which comprise about three and one half acres and include the homestead formerly occupied by the testatrix. The respondent and her sister occupied the premises until September, 1916, when Mrs. Taylor (Sarah Pearson Wingate) transferred to the petitioner all her interest in the premises. The respondent has continued to occupy them to the present time. The building is a single family house.

The claim of the petitioner to partition depends upon his right to an estate in possession of the land devised to the respondent and her sister, the statute providing "Joint tenants or tenants in common who, . . . have, respectively, an estate in possession of land may file a petition for partition." R. L. c. 184, § 2. The

will of Mary Shannon gave to her two nieces the use of her homestead free of rent and free from all expense to the extent of \$2,000 a year, as long as either of them should occupy it. The respondent and Mrs. Taylor had the exclusive possession as long as they occupied it. It was intended by the will that the premises should be their home, and if one of them ceased to occupy it the right to hold and possess it belonged to the one who remained in occupation. Mrs. Taylor could not deprive her sister of this right by residing elsewhere; the conveyance by her of her interest in the property did not deprive the respondent of her title nor give to the petitioner the right of possession against her. It was not intended by the testatrix that the possession of this house, designed and constructed for the use of one family, should be interfered with as long as either of her nieces desired to use it. If the petitioner can secure the partition of the premises the sole and exclusive possession of the respondent would be destroyed. This would be contrary to the declared intention of the testatrix.

In *Whiting v. Whiting*, 15 Gray, 503, a testator gave to his daughter, the defendant, "the right to reside in and use and occupy as heretofore accustomed my present dwelling-house as long as she remains unmarried." The same devise was given to another daughter who married and whose right in the house had been thereby extinguished. It was decided that the defendant had the right to the use and occupation of the whole of the dwelling-house. Her enjoyment of this right excluded all other tenants and occupants and the occupancy of any part of it by others was inconsistent with the privilege granted. See *Kingman v. Kingman*, 121 Mass. 249.

In the case at bar the executors were authorized to sell the land and building only when Mary and Sarah ceased to occupy the estate. The stipulation requiring the payment of taxes and expenses was solely for the benefit of the devisees, and contemplated the exclusive possession of the homestead by either or both of them, free from intrusion by all other occupants. The entire will shows that the purpose of the testatrix was to have the home continued with the use and occupation substantially as her nieces had enjoyed it during the lifetime of the testatrix, free from disturbance by third persons.

As the petitioner is not entitled to possession of the whole or a part of the premises, the petition for partition was dismissed properly.

Exceptions overruled.

GEORGE M. HEATHCOTE, administrator, vs. CURTIS PUBLISHING COMPANY.

Suffolk. January 14, 15, 1918. — March 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Guaranty. Deceit. Newspaper.

A statement in an editorial published in a newspaper, that the owner of the paper for years has guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default.

TORT OR CONTRACT, originally brought by Edna G. Heathcote of Newton and afterwards permitted to be prosecuted by George M. Heathcote, her husband, as the administrator of her estate, against the Curtis Publishing Company, a corporation organized under the laws of the Commonwealth of Pennsylvania and having a place of business in Boston, where it published and distributed a weekly newspaper called the Saturday Evening Post, and published therein an editorial article entitled "Concerning the Three of Us" and certain advertisements of the North American Construction Company, whereby the plaintiff's intestate was induced to order from that construction company "a Marsden (Aladdin) House," to her alleged great loss and damage, as described in the opinion. Writ dated August 24, 1914.

In the Superior Court the case was tried before Thayer, J., who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant and by agreement of the parties reported the case for determination by this court. If the ordering of the verdict was correct, judgment was

to be entered for the defendant on the verdict. If there was any evidence warranting the submission of the case to the jury a new trial was to be ordered.

G. L. Ellsworth, (G. M. Heathcote with him,) for the plaintiff.

W. D. Turner, for the defendant.

CARROLL, J. Since her marriage to the plaintiff in December, 1909, the plaintiff's intestate was a subscriber to the "Saturday Evening Post." In April, 1912, an editorial published by the defendant in that paper, entitled "Concerning the Three of Us," stated in substance that the defendant had for years guaranteed every advertisement in its columns to be honest and trustworthy and the "publishers guarantee the integrity of its advertising." This publication was read by the intestate, who was then thinking of building a house. Before February, 1913, she saw in the "Saturday Evening Post" an advertisement of the North American Construction Company concerning the "Aladdin house or Aladdin system" of partly made houses, and also an advertisement by the construction company entitled "How to Beat the Building Game." Mrs. Heathcote wrote to the construction company, which replied to her letter, and on May 29, 1913, ordered from it "a Marsden (Aladdin) House" for the sum of \$1,464.90.

The parts of the house arrived at West Newton soon after July 29, 1913, and were taken to the land of the deceased. There was evidence that no plan was received indicating where the parts could be found, or instructions showing how the work was to be carried on; and that it required a skilled carpenter to construct the house. There was also evidence of deficiency in material; that some of the parts did not fit; that the building material was not as represented; and that in other respects the North American Construction Company had failed to carry out its contract. When the construction company learned that some of the flooring was missing, it authorized the plaintiff to purchase it at the expense of the company. In December, 1913, the plaintiff wrote to the company "stating the items that were short," and later, in settlement of the claim, received from it a check for \$69 which he refused to accept.

The declaration is in four counts: the first alleges a breach of the contract of the defendant, in guaranteeing the "honesty,

integrity, [and] trustworthiness" of its advertisers, to the loss and damage of the plaintiff; the second and third are based upon the implied contract in holding out the defendant's advertisers as trustworthy, and its duty to use proper care to "investigate the truth of said recommendation;" the fourth sets out the defendant's fraud. At the close of the evidence the judge directed a verdict for the defendant and reported the case to this court.

While there was evidence that the North American Construction Company failed to perform its contract with the plaintiff's intestate, there was no evidence that this company was engaged in a fraudulent business, was financially irresponsible or was in the habit of intentionally deceiving people. The editorial was not strictly a guarantee to answer for the debt or default of another, and it contained no words indicating such an intention; it was in effect merely a recommendation of its advertisers. "The integrity of its advertising" and "guaranteed . . . to be honest and trustworthy," indicate no more than this: that its advertisers can be depended upon as reliable and honest. A statement that a manufacturer is trustworthy is an assurance that he is so reputed, — that nothing to the contrary is known; and, while an action may lie upon such a promise in case of fraud, it is not a statement which gives a right of action against the publisher if the party recommended does not do as he agrees under any particular contract. The defendant assured the readers of its publications that its advertisements were honest and trustworthy. It did not guarantee the faithful performance of contracts made by its advertisers nor agree to answer for their debt or default; nor did it promise that in supplying materials for the construction of the house the North American Construction Company would fully and exactly carry out the terms of agreement with the plaintiff's intestate. See *Eaton v. Mayo*, 118 Mass. 141.

We find nothing in the evidence to show a breach of the defendant's promise. On the contrary, the defendant, according to its practice, before receiving the advertisement, made a thorough investigation of the North American Construction Company, "the personnel of the company, their standing, . . . their business and financial ability and their general reputation;" and the result was entirely satisfactory. There is nothing to show that this investigation was not careful and complete, or that it revealed

or ought to have revealed any thing not in harmony with the statements of its editorial.

There is nothing in the answer of the defendant's president that shows a failure to examine thoroughly the affairs of the construction company. It appears from his answers that the North American Construction Company advertised in the "Saturday Evening Post" during the years 1910, 1911 and 1913, and that the defendant had no knowledge that this company was unreliable or ever had failed to fulfil its contracts. Two or three complaints about the construction company had been made to the defendant, but, with one exception, it did not appear what the reasons were, if any, for these complaints, or on what basis they were settled, if settlements were made. In one case the complaint was from a purchaser of a house, who said the siding and flooring were imperfect. He wrote to the North American Construction Company about it several times but no adjustment was made; he then wrote to the defendant, and although he did not make the purchase because of an advertisement "seen especially in the paper of the defendant," but after a visit to the construction company's factory, the construction company settled the loss and the matter was ended. These complaints did not show that the construction company was dishonest, unreliable, or lacking in integrity, and they are far from showing any neglect on the part of the defendant to investigate properly the North American Construction Company and the standing and reputation of its officers.

There is no evidence that the representations made by the defendant were false. It follows that the verdict was directed properly and judgment is to be entered for the defendant.

So ordered.

PATRICK COMERFORD'S CASE.

Suffolk. February 5, 1918. — March 2, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act.

If a teamster was sent with a team by his employer, a master teamster, to transport for a contractor, who was a subscriber under the workmen's compensation act, concrete window sills, wheelbarrows, picks and shovels to a place in a neighboring town where the contractor was constructing a garage, and if the carrying of building material and appliances from the subscriber's yard to the place where the building was to be erected was a part of the trade or business carried on by the subscriber as a building contractor and was not merely ancillary and incidental to the work of constructing the building, an injury to such teamster from having one of the concrete window sills slip and fall upon him as he was assisting in loading it on his team at the contractor's yard is within the provision of St. 1911, c. 751, Part III, § 17, entitling an employee of a subcontractor to compensation under the act.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Patrick Comerford, an employee of one Connors, a master teamster, who was injured on May 6, 1915, when assisting in loading a concrete window sill upon his team for transportation to Mattapan to be used by the McDonald and Joslin Company in the construction of a small brick garage there.

The case first was heard in the Superior Court by *Wait, J.*, who made a decree in accordance with the decision of the Industrial Accident Board, and on appeal to this court, in a decision reported in 224 Mass. 571, it was ordered that the case should be recommitted to the Industrial Accident Board, where the employee might move for a hearing and for the introduction of further evidence upon the question whether the work performed by him was a part of the business of the McDonald and Joslin Company or was merely ancillary and incidental thereto.

Such a motion having been made and granted, there was a further hearing before the Industrial Accident Board, who made an award granting the employee compensation under St. 1911,

c. 751, Part III, § 17, and the insurer appealed to the Superior Court, where the case was heard by *Wait, J.* The findings of the board at the new hearing and the evidence on which they were based are described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

N. F. Hesseltine & J. F. Scannell, for the insurer.

E. M. Shanley, for the employee.

CARROLL, J. The previous decision in this case, reported in 224 Mass. 571, recommitted the case to the Industrial Accident Board for the introduction of further evidence upon the question, whether the work performed by Comerford was a part of the business of McDonald and Joslin Company or was merely ancillary and incidental thereto.

The board found that the employee, Patrick Comerford, was employed as a teamster by Connors, an independent contractor; and that the subscriber, the McDonald and Joslin Company, engaged Connors to furnish a teamster to cart material, tools and supplies from its yard to the site of a building it was erecting at Mattapan.

On the morning of May 6, 1915, Comerford drove to the subscriber's yard, and while engaged there in moving a window sill which was to be used in the construction of the building, he was injured. The subscriber, a firm of building contractors, was accustomed to employ an independent contractor to carry its material, tools and supplies from its yard to the place where they were to be used. The board found that the "conveyance of picks, shovels, wheelbarrows and of constructed and fabricated parts of a building from the storehouse of the subscribers to the premises where they are to be used, or are to be combined into a proposed structure which the subscribers have undertaken to erect, is a part of the business of such subscribers," and awarded the plaintiff compensation.

If a subscriber makes a contract with an independent contractor to do the subscriber's work and the insurer would be liable to pay compensation if such work was executed by an employee of the subscriber, it is required to pay such compensation to the employee of the independent contractor, if the work is a

part of "or process in" the trade or business carried on by the subscriber, and not merely incidental or ancillary thereto, and if the injury occurs "on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber." St. 1911, c. 751, Part III, § 17. Under this section the employee of a contractor can receive compensation, if the employee shows he was at work on premises under the control and management of the subscriber or where the contractor has agreed to perform the particular work, and, in addition, that his injury arose out of and in the course of employment which was a part of the subscriber's trade or business, and not merely incidental or ancillary to it. There was evidence to warrant the finding that the carrying of building material and appliances from the subscriber's yard to the place where the building was to be erected was a part of the trade or business carried on by the subscriber as a building contractor. Their removal was not merely ancillary or incidental to the work of constructing the building, and this work could not be contracted for so as to relieve the subscriber of the obligations imposed by the workmen's compensation act, even though it was customary for the subscriber to contract for the transfer of its materials. See *Knight v. Cubitt & Co.* L. R. [1902] 1 K. B. 31; *White v. George A. Fuller Co.* 226 Mass. 1.

It was undisputed that the injury occurred while the employee was upon the subscriber's premises which were under its control and management, and where the contractor had undertaken to carry on the work. And as this work was a part of the subscriber's trade or business, the decree awarding compensation to the employee is affirmed.

So ordered.

JENNIE I. GAVIN vs. DURDEN COLEMAN LUMBER COMPANY.

Middlesex. January 8, 9, 1918. — March 4, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Mortgage, Of real estate. Agency. Election. Witness, Cross-examination. Practice, Civil, Exceptions, New trial.

Where the tenancy of a tenant at will paying rent by the month was terminated by a conveyance of the property by the landlord eleven days after the last rent day, the landlord in an action for use and occupation against his former tenant at will cannot recover any rent for the eleven days immediately preceding the termination of the tenancy, because no rent had accrued for that period.

Where the owner of land, which is occupied by a tenant at will, conveys it to another by a warranty deed, taking back a mortgage, and afterwards forecloses the mortgage and again acquires title to the land by a deed made under a power in the mortgage, he has no claim for rent under R. L. c. 129, § 3, against his former tenant at will for a period during which, without notice or knowledge of the conveyance by the owner, the former tenant continued to occupy the land as a tenant at sufferance.

Where services are rendered and money is paid for a person who afterwards turns out to have been the agent for an undisclosed principal, an action for the services and money brought against the agent, in which judgment is entered and execution issued while the plaintiff still is ignorant of the existence of the principal, if the judgment is wholly unsatisfied, is not an exercise of the plaintiff's right of election to hold the agent, and, therefore, is no bar to an action for the same services and money brought against the principal when he has become known.

The exclusion of evidence, offered on the cross-examination of a witness for the purpose of showing bias, is within the discretionary power of the presiding judge, which in the present case was exercised properly.

No exception lies to a denial of a motion for a new trial by the trial judge in the proper exercise of his discretion.

CONTRACT, by Jennie I. Gavin, the wife of Thomas J. Gavin, of Watertown, against the Durden Coleman Lumber Company, a corporation organized under the laws of the State of Georgia, a manufacturer and a wholesale dealer in pine lumber having no place of business in this Commonwealth, with a declaration in two counts, the first count being for the use and occupation of a certain tract of land on Arsenal Street in Watertown from August 4, 1914, to January 4, 1915, at \$25 a month, \$125, and the second count as the assignee, through a third person, of a

certain account of the plaintiff's husband against the defendant, amounting to \$486. Writ dated February 15, 1916.

In the Superior Court the case was tried before *Wait, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings, besides two others which were waived:

"1. On all the evidence the plaintiff is not entitled to recover and your verdict should be for the defendant.

"2. Thomas J. Gavin (the husband of the plaintiff in this action) having elected to bring suit against the Boston and Southern Lumber Company on the items making up 'Count 2' in the Second District Court of Eastern Middlesex at Waltham and the Municipal Court of the City of Boston, cannot later by the assignment of the bill to his wife thus enable her to maintain a suit on the same bill against this defendant.

"3. As to the first count of the plaintiff's declaration, which is a claim for use and occupation of land in Watertown from August 4, 1914, to January 4, 1915, the plaintiff having given a deed of this land to one James J. Hunnewell, she is precluded from recovery against this defendant during the time the title to said land was in Hunnewell.

"4. Thomas J. Gavin (the husband of the plaintiff in this action) having elected to bring suit against the Boston and Southern Lumber Company in the Second District Court of Eastern Middlesex at Waltham, secured judgment and had execution issued to him on the item 'August 4, 1914, Check paid Boston and Maine Railroad \$325,' the plaintiff in this action cannot, of course, prevail on that item against this defendant.

"5. The bringing suit and taking judgment by Thomas J. Gavin (the husband of the plaintiff in this action) against the Boston and Southern Lumber Company was an election to hold the said Boston and Southern Lumber Company for the bill which it is now claimed is due this plaintiff by the Durden Coleman Lumber Company.

"6. The bringing of suit by Thomas J. Gavin (the husband of the plaintiff in this action) against the Boston and Southern Lumber Company in the Municipal Court of the City of Boston for the same items claimed to be recovered for in count two of this suit, after Gavin knew the Boston and Southern Lumber Company in

contracting the bill claimed to be agent for the defendant was an election on his (Gavin's) part to hold the Boston and Southern Lumber Company for the bill, and the plaintiff, by taking an assignment of the bill from him, cannot hold the defendant liable on the same."

The judge refused to make any of these rulings and left the case to the jury with other instructions.

The jury returned a general verdict for the plaintiff in the sum of \$676.68; and the defendant alleged exceptions. The defendant also filed a motion for a new trial, which was denied by the judge. The judge made an order that the defendant's exception to his denial of the motion for a new trial might be incorporated into the defendant's bill of exceptions.

J. F. Barry, (*W. S. McCallum* with him,) for the defendant.

P. M. Lewis, (*P. B. Bennett* with him,) for the plaintiff.

PIERCE, J. On the first count the plaintiff seeks to recover rent of the defendant for the use and occupation of certain premises from August 4, 1914, to January 4, 1915, at \$25 per month. There was evidence to warrant a finding that the defendant became a tenant at will and entered into possession of the premises on August 4, 1914, under an implied contract made by the duly authorized agents of the plaintiff and the defendant.

On September 17, 1914, the plaintiff, by warranty deed, conveyed the entire premises and received simultaneously a mortgage deed to secure the purchase money. On December 17, 1914, the mortgage was foreclosed and the plaintiff acquired the title. The defendant occupied the premises for the time stated in the declaration, without the payment of rent and without notice of the transfer of title by the conveyance of the plaintiff or under the power of sale.

Under these circumstances the plaintiff cannot recover for the rent between September 4 and September 17, 1914, because the stipulated rent had not accrued and there cannot be an apportionment. *Lamson v. Clarkson*, 113 Mass. 348. *Emmes v. Feeley*, 132 Mass. 346. *Hammond v. Thompson*, 168 Mass. 531.

Nor can there be a recovery of rent after the conveyance. The title of the plaintiff, under which the defendant entered into possession of the premises, was determined by the voluntary transfer of the reversion; the defendant thereupon became a tenant at

sufferance and, after notice of the transfer, liable to pay rent to the grantees if he continued in possession. R. L. c. 129, § 3. *Hollis v. Pool*, 3 Met. 350. *Furlong v. Leary*, 8 Cush. 409. *Bunton v. Richardson*, 10 Allen, 260. *Pratt v. Farrar*, 10 Allen, 519. *Dixon v. Smith*, 181 Mass. 218. *Jones v. Donnelly*, 221 Mass. 213. As there is no evidence of notice of the alienation of title, the plaintiff cannot recover for use and occupation after September 17, 1914, and the exception in this regard must be sustained.

Upon the several issues raised at the trial upon the second count, notwithstanding the incomplete and somewhat inconsistent testimony of the witnesses, the jury would be warranted in finding that the assignor of the plaintiff expended the money and rendered the services at the times and to the amounts as they appear in the account annexed; that the money was expended and the services were rendered at the request of the Boston and Southern Lumber Company, a Massachusetts corporation; that the Boston and Southern Lumber Company in this transaction was the duly authorized agent and acted in behalf of the defendant, the Durden Coleman Lumber Company, a foreign corporation which had no place of business in this Commonwealth; that the fact of the agency for the corporation was unknown to the assignor at the time the money was paid and the services were performed; that the items were charged and credit was given to the agent; that an action was brought against the agent to recover the first item of the account annexed, \$325; that judgment in default was entered; that execution issued; that the judgment is unsatisfied in whole or in part; that the plaintiff in the action was ignorant of the existence of a principal when he recovered judgment against the agent; that another action was brought against the agent to recover the sum claimed to be due upon the remaining items of the account annexed, and that the action is now pending.

It is the settled law that a person dealing with an agent of an undisclosed principal may, upon discovery of the principal, resort to him or to the agent with whom he deals at his election. *Raymond v. Crown & Eagle Mills*, 2 Met. 319. And it is equally well settled that an election once made with full knowledge of the liability of the newly discovered principal, determines the right and obligations of the parties. The requests, in substance, to

rule that the bringing of the action and taking judgment against the agent, and the bringing of an action against the agent "for the same items claimed to be recovered for in count two of this suit," was an election to hold the agent, could not have been given. The bringing of an action against the agent, with knowledge of the liability of the principal, is not conclusive of an election unless followed to a judgment. *Raymond v. Crown & Eagle Mills, supra.* *Kingsley v. Davis*, 104 Mass. 178. *Estes v. Aaron*, 227 Mass. 96. *Priestly v. Fernie*, 3 H. & C. 977. The bringing of an action against the agent, followed by his default and the entry of judgment by the creditor in ignorance of the existence of the principal, is not an election because there has never been an opportunity to make a choice. *Greenburg v. Palmieri*, 42 Vroom, 83. *Lindquist v. Dickson*, 98 Minn. 369.

The exclusion of the evidence on cross-examination "to show bias of a witness . . . by showing . . . [that he] had been sued to judgment by the defendant company, cited into the poor debtor court, where . . . the present plaintiff, went on his bond" when the witness was defaulted and judgment was recovered against the present plaintiff as surety, was within the sound discretion of the judge, who does not appear to have exceeded his authority. *Miller v. Smith*, 112 Mass. 470, 476. *Holden v. Prudential Ins. Co. of America*, 191 Mass. 153, 157, 158. *Commonwealth v. Phelps*, 210 Mass. 109, 114.

No exception was taken to the charge, and we therefore do not consider the argument of the defendant in relation thereto other than to say that we perceive no reversible error in its treatment of the evidence and of the requests for rulings.

The motion for a new trial was addressed to the discretion of the court, and an exception does not lie to its refusal.

Exceptions sustained as to the first count and overruled as to the second count.

So ordered.

HENRY A. HILDRETH vs. CHARLES F. ADAMS.

Suffolk. January 10, 1918. — March 4, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Covenant.

A lease of an apartment contained a provision under which the lessee could terminate the lease by giving a certain notice in writing and also contained the following covenant: "It is hereby agreed by and between the parties hereto, that occupancy (with consent of the Lessor) of the granted premises, after the expiration of this lease, by the Lessee or his representatives, shall (at option of Lessor) constitute a renewal of this lease by the year so long as occupied upon the terms and conditions herein stipulated, unless an agreement to the contrary shall have previously been made in writing between the parties hereto." The lessee gave the required notice in writing which would terminate the lease on a certain day, and on that day the lessee, instead of vacating the premises, wrote a letter to the lessor in substance proposing to retain the apartment for another month as a tenant at will or at sufferance, agreeing to pay the rent for that month and to surrender the apartment at the end of it. Thereupon the lessor treated the lease as renewed by the continued occupation of the lessee. The lessee moved out of the apartment before the expiration of the additional month, and the lessor continued to demand the payment of rent under the lease and brought an action against the lessee for such rent covering a period that included four months after the moving out of the lessee. *Held*, that under the agreement contained in the covenant the occupancy by the lessee after the expiration of the term, with the assent of the lessor, constituted a renewal or extension of the lease upon the same terms and conditions at the option of the lessor, which he had exercised.

CONTRACT for the rent of a suite of rooms numbered 2 on the first floor of an apartment house known as the Wrexham, numbered 1382 on Beacon Street in Brookline, for the months from August, 1915, to February, 1916, inclusive, at \$55 a month. Writ dated February 2, 1916.

In the Superior Court the case was tried before *Bell, J.* On the day of the trial the defendant made an offer of judgment in the sum of \$121.54. The evidence is described in the opinion. At the close of the evidence the judge denied a motion of the defendant that a verdict be ordered in accordance with the offer of judgment, and granted a motion of the plaintiff that a verdict be ordered for him. The judge then ordered a verdict for the plaintiff in the sum of \$416.43 and, before the recording of the verdict, reserved leave with the assent of the jury to enter a verdict

for the plaintiff in a smaller amount, if, upon exceptions taken on questions of law reserved, this court should decide that such a verdict should have been entered, and reported the case for determination by this court, such order to be made as justice and equity might require.

G. K. Gardner, for the defendant.

E. H. Vaughan, E. T. Esty & J. Clark, Jr., for the plaintiff, submitted a brief.

PIERCE, J. A lease by indenture, executed on September 10, 1913, contained an habendum clause and a covenant which respectively read as follows:

"To have and to hold the premises hereby demised unto the Lessee, for the term of one (1) year from the first day of October in the year nineteen hundred and thirteen until the first day of October in the year nineteen hundred and fourteen (if then terminated as hereinafter provided) and thereafter from year to year, until one of the parties hereto shall, on or before the first day of August in any year, give to the other party written notice of his intention to terminate this lease on the first day of the following October, in which case the term hereby created shall terminate in accordance with such notice."

"It is hereby agreed by and between the parties hereto, that occupancy (with consent of the Lessor) of the granted premises, after the expiration of this lease, by the Lessee or his representatives, shall (at option of Lessor) constitute a renewal of this lease by the year so long as occupied upon the terms and conditions herein stipulated, unless an agreement to the contrary shall have previously been made in writing between the parties hereto."

Under this lease, the defendant entered as lessee into possession of the tenement demised on or about October 1, 1913, and uninterruptedly and continuously occupied it until sometime between October 27 and 31, 1915. On July 1, 1915, the defendant sent the plaintiff a check for all rent then due and a notice of his intention to surrender the premises, as follows: "You are hereby notified that I will vacate the above premises at the expiration of my present lease. Please acknowledge check and notice by letter. . . ." The plaintiff acknowledged receipt of the check and notice, and no question of the formal sufficiency of the notice is raised.

On September 30, 1915, the day of the expiration of the lease of the passing year, the defendant did not vacate the premises but sent a letter to the plaintiff as follows: "Endeavored to get you today over telephone to see if could arrange about an apartment with you. I find present apartment too small for us the coming winter and Mrs. Adams informs me you would not be willing to transfer us to an upper floor at same rental we are paying now for suite 2, so will be forced to change. Have been very busy and away from city a great part of the last month on business negotiations that will culminate next week. At that time will send you check in full for rent due to November 1st and apartment will be at your disposal on that date." As a declaration of his intention to consider the occupancy of the premises by the lessee after the expiration of the lease "a renewal of this lease by the year" the plaintiff, in a letter dated October 1, 1915, in reply to the letter of the defendant, enclosed and rendered the defendant a bill for the October rent which was payable in advance under the terms of the lease.

This letter, the reply of the defendant, and the subsequent correspondence indicate plainly the contentions of the parties; which, on the part of the plaintiff, is that the lease was not determined by the giving of a notice of an intention to vacate at the end of the year and then not going out, but was continued and renewed without a formal renewal for the further term of one year from October 1, 1915, by reason of the express language of the covenant "that occupancy (with consent of the Lessor) of the granted premises, after the expiration of this lease, by the Lessee or his representatives, shall (at option of Lessor) constitute a renewal of this lease by the year so long as occupied upon the terms and conditions herein stipulated;" and on the part of the defendant that his holding over did not constitute a renewal of the lease under the covenant but a tenancy at sufferance merely, because he did not occupy the premises after the expiration of the lease upon the terms and conditions therein stipulated but upon different terms and conditions, to wit, the wish to become a tenant at will expressed in the letter of September 30, 1915.

We are of opinion that the contention of the plaintiff is correct. A fair consideration of the habendum and the covenant leads to

the conclusion that it was the plain intention of the parties to the instrument, when it was executed, at the option of the lessor to bind the defendant as lessee for another year should he fail to give the required notice or, giving the notice, should neglect to vacate the premises at the expiration of the lease. We are also of opinion that by force of the explicit words of the covenant occupancy by the lessee after the expiration of the term, with the assent of the lessor, constituted a renewal or extension of the lease upon the same terms and conditions, and that the intent of the lessee to occupy the premises as a tenant at will or at sufferance after the expiration of the term is not an occupation upon different "terms and conditions" within any reasonable construction of those words as they occur in the covenant. *Scott v. Beecher*, 91 Mich. 590. *Cavanaugh v. Clinch*, 88 Ga. 610. *Graham v. Dempsey*, 169 Penn. St. 460. *Crawford v. Kline*, 45 Vroom, 203. *Ranlet v. Cook*, 44 N. H. 512. See *Stone v. St. Louis Stamping Co.* 155 Mass. 267; *Ferguson v. Jackson*, 180 Mass. 557; *Pope v. Abbott*, 211 Mass. 582; *Willoughby v. Atkinson Furnishing Co.* 93 Maine, 185.

We do not agree with the argument of the defendant that the absolute option given the lessor has all the characteristics of an arbitrary penalty or forfeiture; nor do we agree with the contention that the enforcement of the covenant will give the plaintiff "a grossly disproportionate compensation for the defendant's failure to vacate the premises at the end of the term."

We think the verdict for the plaintiff was directed rightly. It follows, in accordance with the terms of the report, that judgment is to be entered on the verdict. And it is

So ordered.

BOSTON SAFE DEPOSIT AND TRUST COMPANY vs.
FLORENCE L. BACON.

Norfolk. November 22, 1917. — March 5, 1918.

Present: RUGG, J. C., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Will, Competency of witnesses, Soundness of mind, Undue influence. *Witness*, Attesting. *Corporation*, Officers and agents. *Evidence*, Of soundness of mind, Opinion, Declarations of deceased persons, Presumptions and burden of proof. *Practice*, Civil, Judge's charge, Exceptions.

The will of a woman, in which a trust company was named as executor, was executed at the office of the trust company. More than four years before her death the testatrix and the trust company had executed an indenture of trust, whereby she had transferred to the trust company as trustee certain bank books, cash and securities amounting to about \$50,000 and subsequently had transferred to it other property, so that at her death the trust company held substantially \$100,000 which it was bound "to transfer, convey and pay over . . . to her executors or administrators." The attesting witnesses were the senior clerk of the trust department of the trust company, the officer of the trust company in charge of its real estate and mortgages and a lawyer employed in the trust department of the trust company who had taken the acknowledgment of the testatrix to the indenture of trust. At the trial of issues relating to the proof of the will, the contestant alleged that the will was not attested and subscribed by competent witnesses. The attesting witnesses were examined on the *voir dire* and the presiding judge found as a fact that "these witnesses are not disqualified by reason of any interest, and declined to rule that upon all the evidence any one of said three witnesses was not a competent witness to the will and further declined to rule that on all the evidence as a matter of law the will . . . was not attested and subscribed by three competent witnesses." *Held*, that the finding of the judge was warranted and that his ruling was right.

In the same case it was *said*, that the fact that the subscribing witnesses were the servants of the trust company named as executor and acted at the request of the trust company did not make the attestation of the will the act of the trust company itself.

Upon the issue of the soundness of mind of an alleged testatrix, the presiding judge excluded as evidence a certified copy of a decree of the Probate Court appointing a guardian for an uncle of the testatrix as "an insane person, and incapable of taking care of himself." No evidence was introduced or offered tending to prove that the testatrix was at any time afflicted with any form of insanity or to prove that the malady suffered by the uncle was of such a form and character as to be transmissible and inheritable from a common ancestor. *Held*, that the exclusion of the evidence was a proper exercise of judicial discretion.

In the case in which the point above stated was decided, a physician, who had attended the late husband of the testatrix in his last illness but never had attended the testatrix professionally, was asked, "In your opinion what was her

mental development, I mean the maturity of her mind?" The contestant, who put the question, did not ask to have the answer confined to a statement of what had been observed by the witness. The witness was not an expert in mental diseases. The judge excluded the question. *Held*, that the exclusion by the judge of the question as calling for opinion was justified.

In the same case it was *said* that, if the counsel for the contestant did not wish to abide by the ruling of the judge excluding the question quoted above, he should have made it plain to the judge that the question called for a statement of the facts observed by the witness and not for the witness's opinion, and that, not having done this, it was not open to the contestant to contend that the question did not call for an expression of opinion as it purported to do.

In the same case the judge, subject to an exception by the contestant, refused to allow a cousin of the testatrix to testify that the witness's mother, long since dead, had told her between fifty and sixty years ago that a brother of her father, who also was an uncle of the testatrix, shot himself and committed suicide about 1836. *Held*, that the exception must be overruled, because the evidence might have been excluded on the ground that the judge did not believe that the statement ever was made, or, if he believed that it was made, he might not have been satisfied that the witness's mother had personal and adequate knowledge of the facts stated.

Upon the trial of the issue whether undue influence was exercised upon an alleged testatrix, the presiding judge in his charge erroneously instructed the jury that "the burden is upon the contestants to show that the established facts are inconsistent with any theory but that of the theory of undue influence," but his instructions as a whole made it plain that the jury were instructed correctly that the burden was not upon the executor to establish the negative of undue influence but was upon the contestants to show affirmatively the existence of undue influence by a fair preponderance of the evidence, and it was *held*, that there was no error of substance sufficient to sustain an exception.

APPEAL from a decree of the Probate Court for the county of Norfolk, allowing the will of Elisabeth Miller French, late of Brookline, who died on January 21, 1916, in which will the petitioner, the Boston Safe Deposit and Trust Company, a corporation, was named as executor.

The issues sent for trial to the Superior Court are described in the opinion. Those issues were tried before *McLaughlin, J.* The evidence relating to the competency of the attesting witnesses is described in the opinion.

Mrs. Bowen, a cousin of the testatrix, testified that William Reed Holbrook, mentioned in the opinion, was a brother of the father of the testatrix and lived during the last two years of his life in the same house in which the witness lived in Dorchester and died there in 1886, that he occupied a front room of the house in charge of a woman nurse, who had the adjoining room, that he kept to his room most of the time, did not appear at meals and

had his meals taken up to him. The certified copy excluded by the judge was a copy of a decree appointing the brother of the witness the guardian of William Reed Holbrook.

Dr. Mann, mentioned in the opinion, was a woman physician, who had attended the late husband of the testatrix in his last illness in the months of May and June, 1911. She never had attended the testatrix professionally. She was asked, "Now, from your observation of her [the alleged testatrix], did you form some opinion as to her mental development?" and answered, "Yes, I had." She then was asked, "In your opinion what was her mental development, I mean the maturity of her mind?" This question was excluded by the judge.

The portion of the judge's charge relating to the burden of proof is described in the opinion.

The jury on each of the three issues returned answers sustaining the will; and the appellant alleged exceptions.

W. R. Bigelow & V. J. Loring, for the contestant.

C. K. Cobb, for the petitioner.

PIERCE, J. This is a probate appeal from the allowance of the will of Elisabeth Miller French, who died on January 21, 1916. Issues for the jury, as framed by a single justice of this court, were in regard to the execution of the will, the soundness of mind and memory of the testatrix, and the undue influence of certain persons named. In answer to the issues the jury found that the instrument propounded for probate was executed according to law, that the testatrix was of sound and disposing mind and memory, and that the instrument was not procured by or with the undue influence of the persons named or either of them. The appellant raises questions as to the competency of the witnesses to the will, the exclusion of evidence and the instructions of the judge. We shall consider the exceptions in the order of their argument in the brief of the appellant.

Were the witnesses competent at the time of signing the will? R. L. c. 135, § 1. *Pease v. Allis*, 110 Mass. 157. The attesting witnesses were examined on the *voir dire*. At the close of their testimony, which is set down in the bill of exceptions, the presiding judge found as a fact that "these witnesses are not disqualified by reason of any interest, and declined to rule that upon all the evidence any one of said three witnesses was not a compe-

tent witness to the will and further declined to rule that on all the evidence as a matter of law the will . . . was not attested and subscribed by three competent witnesses." An exception was duly alleged and saved to the foregoing ruling and refusal to rule. The evidence being reported the question of the competency of the witnesses is properly before us. *Gorton v. Hadsell*, 9 Cush. 508, 511. *Quinsigamond Bank v. Hobbs*, 11 Gray, 250, 258. *Ames v. New York, New Haven, & Hartford Railroad*, 221 Mass. 304, 306. However, the findings of fact are conclusive unless the party objecting thereto shall establish clearly that they were based on an erroneous view of legal principles. *Wylie v. Cotter*, 170 Mass. 356. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 3.

It appeared from the testimony of these witnesses that an indenture of trust between the testatrix and the Boston Safe Deposit and Trust Company was entered into on August 24, 1911; that under it the testatrix transferred to the trust company, as trustee, certain bank books, cash and securities amounting to about \$50,000; that subsequently, she transferred to it other property; and that at her death the trust company held substantially \$100,000 which it was bound "to transfer, convey and pay over . . . to her executors or administrators." It further appeared that the attesting witness Lyman H. Allen was the senior clerk of the trust department of the trust company and had been in its employ for thirteen years; that he made the original book entries with reference to this property under the indenture of trust; that the property itself was placed with property belonging to others, held in similar manner, in the vaults of the trust company; that he worked "principally on the books, not particularly in reference to Mrs. French's estate, but all of our trust estates;" that he made the book entries with reference to the collection of interest on the savings bank deposits and they were credited to the account of the testatrix; that he did not actually collect the interest, but received the checks from the various institutions where the money of the testatrix was deposited, and that he "had little else to do with her estate." The attesting witness Robert L. Shewell had charge of the real estate and mortgages of the trust company and had nothing to do with the trust estate of the testatrix. The attesting witness Frank B. Tallman was a

lawyer, employed in the trust department of the trust company. He took the acknowledgment of the testatrix to the indenture of trust, made some entries on the books with reference to the trust property, and made one or two statements of account. He had nothing to do with the property itself. No one of the attesting witnesses was a stockholder but each of them had given bonds to the trust company.

Upon the foregoing evidence it is manifest that the finding and ruling of the presiding judge was right. No one of the attesting witnesses had any pecuniary or proprietary interest in the property to be disposed of by the will, and no one of them stood to gain or lose the smallest sum by the effect of a decree setting up or disallowing the probate of the will. *Hawes v. Humphrey*, 9 Pick. 350. *Northampton v. Smith*, 11 Met. 390, 396. *Luke v. Leland*, 6 Cush. 259. *Sparhawk v. Sparhawk*, 10 Allen, 155, 159.

We find nothing in the contention that the witnesses, in relation to the integrity of the trust fund, stood as guarantors because of their obligation under their several bonds to hold the trust company harmless for any breaches of trust arising from their own positive acts of default, *Franklin Bank v. Freeman*, 16 Pick. 535, 538; nor do we think the attestation was the act of the trust company because the witnesses were the servants of the trust company, and acted at the request of an officer of that company.

We are of opinion that the judge in the exercise of sound discretion rightly rejected as evidence of the insanity or of the mere weakness of mind or eccentricity of the testatrix the certified copies of the petition and decree of the Probate Court appointing a guardian of William Reed Holbrook "an insane person, and incapable of taking care of himself." Such a decree unreversed is *prima facie* evidence of the actual insanity of the person thereby placed under guardianship, and establishes a status of that individual which is notice of the incapacity of the ward to all the world. *Leggate v. Clark*, 111 Mass. 308. It does not establish as against strangers or as between a party, or privy, and a stranger the form of the insanity of the ward, its transmissible character, or any evidentiary fact upon which the ultimate adjudicated fact is grounded. *Brigham v. Fayerweather*, 140 Mass. 411, 413.

In the case at bar, other than the decree offered in evidence, no testimony was introduced or offered tending to prove that the testatrix was at any time afflicted with any form of insanity, nor was evidence offered to prove that the malady upon which the decree was founded was in form and character such as to be transmissible and inheritable from a common ancestor. It is undoubtedly the general rule and well established practice to admit evidence of the insanity of blood relatives of the testatrix in the ancestral line, when the insanity of that individual is in question; but such evidence is never admitted "in aid of the proof showing mere weakness of mind or eccentricity," nor does the rule permit indiscriminate and unexplained evidence of disease afflicting and affecting the mental faculties of the relatives of the person whose insanity is in issue. There must be a foundation laid for the admission of such evidence by the introduction of some evidence of the insanity of the person whose mental condition is in issue, and testimony to the predisposition to insanity by evidence at least tending to show that the disease of the blood relative was hereditary or transmissible. "It rests upon the ground of the hereditary character of insanity." *Baxter v. Abbott*, 7 Gray, 71. *Shailer v. Bumstead*, 99 Mass. 112, 131. *Myer v. Myer*, 184 N. Y. 54; S. C. 6 Ann. Cas. 26, and cases collected.

The exception to the exclusion of Dr. Mann's opinion as to the maturity of the testatrix's mind must be overruled. While the witness could properly testify to the mental development of the testatrix, which was apparent to ordinary or special observation, *Clark v. Clark*, 168 Mass. 523, 526, *Gorham v. Moor*, 197 Mass. 522, *Jenkins v. Weston*, 200 Mass. 488, see *Johnson v. Foster*, 221 Mass. 248, it is evident that the presiding judge understood the question what "in your opinion, . . . was her mental development," to call for an opinion, and not for conclusions of fact resulting solely from observation. Dr. Mann was not an expert in mental diseases or the family physician. The appellant should have made the purpose of the question plain to the judge if he did not wish to abide by the ruling. Not having done so he cannot now be permitted to contend that such was not the intent of the question.

We cannot say that the judge did not rightly exclude the testimony of Mrs. Bowen that her mother, who died many years ago,

told her between fifty and sixty years ago that John Holbrook (her father's brother) shot himself and committed suicide about 1836, because the judge may not have believed that the statement was ever made or, if he did so believe, been satisfied that the mother had personal and adequate knowledge of the facts stated. *Slotofski v. Boston Elevated Railway*, 215 Mass. 318, 321. *Johnson v. Foster*, 221 Mass. 248, 252. The evidence was not admissible as a fact of family history. *North Brookfield v. Warren*, 16 Gray, 171.

The charge that "It is not sufficient to show that the established facts are merely consistent with the exercise of undue influence. The burden is upon the contestants to show that the established facts are inconsistent with any theory but that of the exercise of undue influence," placed a greater burden of producing evidence to establish the affirmative of the issue of undue influence upon the contestants than the rule of proof by a fair preponderance of the evidence, if the charge be considered by itself and apart from the instructions earlier given, that "The burden is not upon the executors to establish the negative of it, but the contestants must establish, by a fair preponderance of the evidence, the affirmative of that issue;" and later, "on the third issue, that the burden is upon the contestants. If they establish, by a fair preponderance of the evidence, that the will as a whole was the result of undue and improper influence exercised . . . then your answer is to be, Yes. If they fail to satisfy you of that, . . . then your verdict should be, No." It is to be noted also that the meaning of the phrase "burden of proof" had been carefully and correctly given by the judge when instructing the jury upon the issue of the execution or not of the will according to law.

We find no reversible error.

Exceptions overruled.

VIRGINIA ARMSTRONG vs. GEORGE R. ARMSTRONG.

Suffolk. January 10, 1918. — March 5, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Marriage and Divorce.

A libel by a wife for divorce alleged cruel and abusive treatment as the sole ground on which a divorce was sought. There was evidence that the libellee neglected his wife, was out many evenings and admitted to his wife that "he had been going . . . with a girl" and there was testimony tending to show his adultery. There was evidence that the libellee's conduct caused his wife mental suffering and that she worried and became sick so that her health was impaired substantially by reason of her husband's conduct, but there was no evidence that he did or said anything for the purpose of injuring her health. *Held*, that the libel must be dismissed, as a divorce for cruel and abusive treatment could not be granted on the facts disclosed.

LIBEL, filed in its substituted form on October 26, 1917, seeking a divorce on the sole ground of cruel and abusive treatment.

The case was heard by *Fox, J.* The evidence is described in the opinion. The judge, after taking the matter under advisement, filed the following memorandum of decision:

"I accept the testimony offered by the libellant and her physicians as true, but I do not find cruel and abusive treatment within the meaning of the statute, and the libellant rests upon this charge alone. Not only is there no evidence of physical violence, but there is no complaint of any unkind act or word in the presence of the libellant. During her sickness she lacked no attention except her husband's personal attention. She has shown simply that because of the alienation of his affections her feelings were outraged and her health impaired. The same evil results may well flow from the simple act of desertion, but we cannot by adding these elements cut short the statutory period."

The judge made an order that the libel be dismissed but "without prejudice to a libel for any other cause." By request of the parties the judge reported the case for determination by this court. If upon the evidence the judge would have been warranted in granting a divorce, his order was to be reversed and an order made granting a divorce; otherwise, the order was to stand.

L. Withington, for the libellant.

W. F. Garcelon, for the libellee, submitted the case without argument or brief.

CARROLL, J. The libellant petitioned for a divorce, alleging cruel and abusive treatment. She testified that she was married in 1910, that in 1916 her husband "stayed away from her longer than he had ever in four years and went out many evenings;" that when she spoke to him about this he said "he had been going . . . with a girl in Boston;" that she became unhappy, could not sleep, "had extreme attacks of vomiting;" that "she expostulated with him and told him of her suffering" and he said he could not give up the girl; that she was worried, became sick and has not completely recovered her health. There was additional evidence of her physical condition, and that her health was injured by her husband's conduct; and also, testimony tending to show his adultery.

The judge found there was no evidence of physical violence, that during the libellant's sickness she lacked no attention "except her husband's personal attention," that her health was impaired "because of the alienation of his affections," and that her testimony and that of her witnesses was true. He dismissed the libel and reported the case, his order to be reversed if upon the facts he was warranted in granting the divorce.

In dismissing the libel the judge was right. On the ground alleged there was no evidence to warrant the granting of the petition. The divorce was not sought because of the husband's adultery, and however cruel his conduct may have been — and although it may have seriously injured the libellant's health — the offense and his confession of it did not amount to cruel and abusive treatment within the divorce statute. R. L. c. 152, § 1.

In *W — v. W —*, 141 Mass. 495, it was held that the commission by the husband of a disgusting act in the presence of his wife, which injured her health, was not cruel and abusive treatment within the statute, in the absence of evidence that the act was done with the intention of injuring her. "The words 'cruel and abusive treatment' seem to import on their face conduct directed toward the other party, and with a malevolent motive." There was no evidence to support a finding that the acts of the husband were committed with such motive, and there was noth-

ing to indicate that the confession of his guilt and his other statements were made with the purpose of injuring his wife. Language may be so irritating and so frequently used as to permit the granting of a divorce because of cruel and abusive treatment when injury to health results from it, but where there is no such purpose — although the libellant's health was severely affected — a divorce cannot be granted on this ground. *Freeborn v. Freeborn*, 168 Mass. 50. A spouse may be guilty of drunkenness or other vices; his habits or disposition, his indifference, neglect, or desertion may cause mental worry and injury to his wife's health; but these acts standing by themselves are not enough to make out a case of cruel and abusive treatment. *Ring v. Ring*, 118 Ga. 183. For somewhat similar cases see *Bowen v. Bowen*, 179 Mich. 574; *Hancock v. Hancock*, 55 Fla. 680; *Huff v. Huff*, 73 West Va. 330.

Neither words nor acts which do not involve physical violence, inflicted on the other party, are sufficient to constitute cruel and abusive treatment within the meaning of the statute, unless it is shown that the language was uttered or these acts were committed with a malicious intent and for the purpose of injuring the libellant. As there was nothing to show such an intent and none can be inferred from the evidence, the judge could not grant the divorce and was fully warranted in dismissing the libel.

According to the terms of the report, the order dismissing the libel is to stand "without prejudice to a libel for any other cause."

So ordered.

FRANK O. WHITE, administrator with the will annexed, vs.

BEN L. STOWELL & another.

Suffolk. January 14, 1918. — March 5, 1918.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Domicil.

A domicil is not lost until another is acquired; and, if a man having a domicil in a city in this Commonwealth moves to another city in an attempt to find employment there and looking for a place to establish himself where he can support his family, without any fixed intention of making the city to which he has moved his home unless he shall succeed in obtaining such an occupation there,

until he has succeeded in obtaining such an occupation in the city to which he has moved his absence from his domicile in this Commonwealth is temporary and his domicile here has not been abandoned.

APPEALS by two different creditors from a decree of the Probate Court for the county of Suffolk allowing the will of Henry W. Wellington, who died in the city of New York in the State of New York on July 29, 1915, and was alleged to have been a resident of Boston at the time of his death.

The appellants stated as their objections to the decree appealed from "that Henry W. Wellington was domiciled in the city of New York in the county and State of New York at the time of his death, and that therefore probate proceedings concerning any alleged will of said Henry W. Wellington should first be held in that jurisdiction."

The appeals were heard together by *Crosby, J.*, the evidence having been reported by a commissioner appointed under Chancery Rule 35. The single justice made a memorandum of decision containing among his findings those that are stated in his opinion.

The memorandum concluded as follows:

"I find that when the testator went to New York in April, 1914, his principal, if not his sole, purpose in going there was to secure a position or employment. He seems to have been diligent and persistent in his efforts to accomplish the desired result, but without success.

"I further find that from April 14, 1914, until the date of his death he had the same object in view, namely, to secure employment. I find that he was willing to be so employed in New York or in any other place where he could obtain a desirable situation.

"I find that he did not intend to establish himself permanently in New York, but was living there temporarily; he probably would have decided to take up his residence in that city or in any other place where he could have obtained employment.

"I find upon all the evidence that he did not live in New York for an indefinite period without a fixed and certain purpose to return to Boston.

"Accordingly I find that the testator never acquired a domicile in New York, but that Boston continued to be the place of his domicile up to and including the date of his death.

"It follows that a decree must be entered affirming the decree

of the Probate Court and remanding the case to that court for further proceedings."

By order of the single justice a final decree was entered ordering that the decree of the Probate Court allowing the will of Henry W. Wellington and appointing Frank Owen White administrator thereof with the will annexed be affirmed and that the case be remanded to the Probate Court for further proceedings. The appellants appealed.

H. L. Barrett, for the appellant Stowell.

W. H. Vincent, *pro se*.

H. Williams, Jr., (*B. D. Barker*, with him,) for the administrator with the will annexed of the estate of Henry W. Wellington.

CARROLL, J. This is an appeal from a decree allowing the will of Henry W. Wellington, alleged to have been a resident of Boston on July 29, 1915, the date of his death. The appellants contend that the testator was a resident of New York. In the Supreme Judicial Court the single justice found that the domicile of the testator was in Boston and affirmed the decree of the Probate Court.

Henry W. Wellington was born in Boston in 1875; after his marriage in 1902 he lived in Hingham and in Boston; and in 1914 his domicile was in Boston where he occupied an apartment which he had leased for two years beginning September 1, 1913. Early in the year 1914, it was discovered he had misappropriated a large amount of money belonging to corporations in which he was an officer, and he was forced to sever his connection with them. He was then without employment. On March 31 or April 1 he left Boston for New York. Mrs. Wellington, hoping to secure employment for her husband, went to California, where she had friends, and remained there until May, 1914, when she joined her husband in Washington in the District of Columbia. Accompanied by a daughter of Mrs. Wellington by a former marriage Mr. and Mrs. Wellington went to New York; they were registered by Mr. Wellington at the Brevoort Hotel as of New York, and remained there a week or ten days. In June, 1914, they hired a furnished apartment in New York from friends of Mrs. Wellington, and occupied it until September, 1914. For a time Wellington was ill in a hospital in New York. After leaving it, he went to Gloucester in this Commonwealth; but he returned to New York

before Christmas, and in 1915 leased an unfurnished apartment for eight months, which he and Mrs. Wellington occupied until he committed suicide, July 29, 1915. After his departure from Boston he was not engaged in any business and was unsuccessful in securing employment either in New York or elsewhere.

The question of a person's domicil is mainly a question of fact; a domicil once acquired is not lost until a new one is obtained. Mere temporary absence does not change it, and personal presence in a place, even for a protracted period, does not of necessity fix the domicil in that place. While actual residence is a circumstance tending to establish the place of domicil at the place of residence, it is not conclusive. *Otis v. Boston*, 12 Cush. 44. *Colleston v. Hailey*, 6 Gray, 517. *Perkins v. Davis*, 109 Mass. 239. *Olivieri v. Atkinson*, 168 Mass. 28. *Palmer v. Hampden*, 182 Mass. 511. "A person cannot be said to lose his domicil or residence by leaving it with an uncertain, indefinite, half formed purpose to take up his residence elsewhere. . . . Until his purpose to remain had become fixed, he could not be said to have abandoned his former residence." *Worcester v. Wilbraham*, 13 Gray, 586, 590. See *Sears v. Boston*, 1 Met. 250.

In 1914 the testator's domicil was in Boston. That domicil remained until a new one was actually acquired. When he left Boston and took up his residence in New York, if it was his intention to reside there and make it his home, without any intention of returning to Boston, then his domicil was in New York at the time of his death; but, if his absence was temporary, if he was seeking employment and looking for a place to establish himself where he could support his family, without any fixed and settled intention of residing in New York, or making it his home, then he did not acquire a new domicil and the domicil of his origin remained.

There was some evidence indicating an intention to give up his home and domicil in Boston — his letters, his resignation from the Harvard and Engineers clubs of Boston, his registering at the Brevoort Hotel and stating that his residence was in New York, the sending of his furniture to Ardmore in Pennsylvania, and his hiring apartments in New York — these facts together with the additional circumstances, standing by themselves, would seem to indicate a permanent change of residence, but they are not conclusive.

There was other evidence of controlling importance which makes it clear that he had not given up Boston as his permanent residence, that he was hoping or expecting to return to it as soon as he could so arrange his affairs, and that his absence was only temporary. When he was sick in the hospital, at the request of Mrs. Wellington, a business acquaintance was endeavoring to obtain for her husband a position in Boston. In June, 1915, six weeks before he died, he said to his aunt, "I rather like New York for business very well, but May [his wife] prefers Boston," and "he was undecided." In July, 1915, he said "he thought he was going to get some business, . . . if he did he would leave New York and he might go West, and he might come back to Boston." On November 24, 1914, he made application to the assessors of Boston for an abatement of his personal tax of \$10,000, which was reduced to \$600. In April or March, 1914, he wrote his cousin that on account of business reverses he was away for a little while to look up some business, and in May of the same year he wrote her saying "on his return to Boston, which he hoped would be in a short time. . . ." He told a boyhood and college friend in 1914 and 1915, "that he had never definitely given up his residence in Massachusetts, that he had furniture there and that he was living around until he settled on something that would give him an adequate living." In April, 1914, in the sublease of their apartment in Boston, both the testator and Mrs. Wellington described themselves as of Boston. Before he went to New York, he told his son-in-law that "he was going to New York to look for a job, but he did n't like New York as a place to live."

These facts, together with his letters and the other circumstances of the case, bring us to the conclusion that he had no definite intention to reside permanently in New York. He was unsettled. He had no established place of business. He was seeking employment. His place of residence depended upon his success in obtaining an occupation. Until he succeeded in this his absence from Boston was temporary and the original domicil was not abandoned. *Ross v. Ross*, 103 Mass. 575. *Olivieri v. Atkinson*, *supra*. *Babcock v. Slater*, 212 Mass. 434. *Sampson v. Sampson*, 223 Mass. 451, 460.

Decree affirmed.

COLEMAN WALSH'S (dependent's) CASE.

Suffolk. February 6, 1918. — February * 6, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act.

In a claim under the workmen's compensation act it was held that on the evidence reported a finding of the Industrial Accident Board, that the death of an employee from tuberculosis was not caused nor accelerated by an injury to his foot a year and five months earlier, was warranted.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board refusing to award to Annie Walsh as the dependent widow of Coleman Walsh compensation for his death on March 10, 1917, alleged to have been caused by an injury received by him on October 5, 1915, when in the employ of the Columbia Steel Shafting Company, a corporation.

The claim was heard by the Industrial Accident Board upon a report made by a member of the board which contained all the material evidence, and the board affirmed and adopted the findings and decision of this member of the board. The decision appealed from was as follows: "The evidence shows and the board find and decide that the employee's death from tuberculosis, on March 10, 1917, had no causal relation to the personal injury received by him on October 5, 1915; therefore, the claim for compensation is dismissed. The claimant failed to sustain the burden of proving that the condition of tuberculosis was occasioned by or aggravated or accelerated by the injury to his foot; and the weight of the medical evidence leaves it as unlikely and improbable that the injury and the disease had any connection with each other."

The case was heard by Fox, J., who made a decree in accordance with the decision of the Industrial Accident Board, and the alleged dependent widow appealed.

G. F. Tucker, (O. Gallagher with him,) for the dependent widow.

* This case is printed out of its chronological order merely by reason of a mistake in treating the date of the rescript as if it were March 6 instead of February 6. The opinion was not withdrawn by the court.

H. S. Avery, for the insurer, submitted the case without argument or brief.

BY THE COURT. The deceased employee sustained injury arising out of and in the course of his employment by a subscriber under the workmen's compensation act. That injury was a fracture of the os calcis and inflammation of the ankle joint. The decisive issue of fact at the hearing was, whether this injury to the employee had a direct causal connection with tuberculosis, of which he died about seventeen months later. The determination of that issue depended upon the weighing of evidence. It need not be recited. A careful examination of the entire record shows that the decision of the single member of the Industrial Accident Board, and that of the board on appeal, was fully justified on the evidence.

Decree affirmed.

SUPPLEMENT.

OPINION OF THE JUSTICES TO THE SENATE.

Under the Constitution of the Commonwealth and the second amendment thereof the Legislature has no power to pass a general law enabling such towns as may adopt its provisions to substitute for the town meeting form of government, in which every qualified voter of the town may participate, a form wherein the town meeting shall consist of a certain percentage of the voters elected as town meeting members, so called, by the voters at large.

THE following order was passed by the Senate on April 30, 1918, and on May 7, 1918, was transmitted to the Justices of the Supreme Judicial Court. On May 13, 1918, the Justices returned the answer which is subjoined.

WHEREAS, There is now pending in the Senate a bill, numbered House 1441, entitled "An Act relative to the administration of town affairs and to authorize the adoption of a limited town meeting," a copy of which is herewith submitted (with changes, as it was passed to be engrossed by the House); and

WHEREAS, There exist grave doubt and uncertainty as to the constitutional power of the General Court to enact the said bill; therefore be it

ORDERED, That the Senate require the opinions of the Honorable the Justices of the Supreme Judicial Court upon the following important questions of law:

First. Has the General Court the power, under the Constitution of the Commonwealth, to pass a general law enabling such towns as may adopt its provisions to substitute for the town meeting form of government, in which every qualified voter of the town may participate, a form wherein the town meeting shall consist of a certain percentage of the voters elected as town meeting members, so called, by the voters at large?

Second. Would House Bill, Number 1441, above mentioned,

as passed to be engrossed by the House, be constitutional if enacted?

House Bill No. 1441, as it was passed to be engrossed by the House, was as follows:

An Act relative to the Administration of Town Affairs and to authorize the Adoption of a Limited Town Meeting.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The selectmen of any town that shall accept this act shall forthwith upon its acceptance divide the territory of the town into voting precincts, to be designated by numbers or letters and to contain approximately an equal number of registered male voters, but not less than three hundred nor more than one thousand voters in any precinct. The precincts shall be so established as to consist of compact and contiguous territory to be bounded, so far as is practicable, by the centre line of known streets and ways and by other well-defined limits. The boundaries shall be reviewed and, if need be, revised, partly or wholly, by the selectmen, in May once in every five years. The selectmen shall, within ten days after any establishment or revision of the precincts, file a report of their doings with the town clerk, the registrars of voters, and the assessors, with a map or maps or description of the precincts and the names and residences of the voters therein. The selectmen shall also cause to be posted in the town hall a map or maps or description of the precincts as established or revised from time to time, with the names and residences of the registered voters therein; and they shall also cause to be posted in at least three public places in each precinct a map or description of that precinct, with the names and residences of the voters therein. The division of the town into voting precincts and any revision of such precincts shall take effect upon the date of the filing of the report thereof by the selectmen with the town clerk. Whenever such precincts are established or revised, the town clerk shall forthwith give written notice thereof to the secretary of the Commonwealth, stating the number and designation of the precincts. The provisions of chapter eight hundred and thirty-five of the acts of nineteen hundred and thirteen, and of any amendments thereof, relating to precinct voting at all elections, so far

as the same are not inconsistent with this act, shall apply to all elections and primaries in a town which adopts this act upon the establishment of voting precincts as hereinbefore provided.

SECTION 2. The registered male voters in each of such precincts shall, at the first annual town election held after the establishment of the precincts, and conformably to the laws relative to elections, not inconsistent with this act, elect by ballot six per cent of such voters in such precinct other than the officers hereinafter designated in section three as town meeting members at large, such elected voters to be town meeting members of the town, one third of whom shall be elected for the term of one year, one third for the term of two years and one third for the term of three years from the day of the annual town meeting; and thereafter, except as hereinafter provided, at each annual town election the voters of each precinct in the town shall, in like manner, elect two per cent of their number to be town meeting members of the town for the term of three years, and shall at such election fill for the unexpired term or terms any vacancies then existing in the number of town meeting members in their respective precincts. Upon every revision of the precincts or of any of them the term or terms of office of all town meeting members within every such revised precinct shall terminate on the date of the next annual town meeting and at the annual town election on the same date there shall be an entirely new election of town meeting members in every precinct so revised, as well as in any precinct or precincts newly established. The town clerk shall, after every election of town meeting members, forthwith notify each member by mail of his election, with instructions to signify in writing to the town clerk, within seven days after the receipt of the notice, his acceptance or refusal of such membership.

SECTION 3. Any town meeting held under the provisions of this act, except as is otherwise provided, shall, at and after the first annual election held under this act, be limited to the voters elected under section two together with the following designated as town meeting members at large, namely, any member of the General Court of the Commonwealth of Massachusetts who is a registered voter of the town, the moderator, the town clerk, the selectmen, the town treasurer, the town accountant, the town counsel, the town collector of taxes and the town auditors, the

road commissioners, superintendent of streets or highway surveyor, the assessors, the water or sewer commissioners, the school committee, the members of the finance commission or committee and the chairman of any board constituted by law or by vote of the town. The town clerk shall notify the town members of the time and place at which town meetings are to be held, such notices, when practicable, to be sent by mail at least four days before any such meeting. The town meeting members, as aforesaid, shall be the judges of the election and qualification of their members. A majority of the town meeting members at any such limited town meeting shall constitute a quorum for doing business; but a less number may organize temporarily and may adjourn from time to time. All town meetings shall be public. The town meeting members as such shall receive no compensation. Subject to such conditions as may be determined from time to time by the members of a limited town meeting any voter of the town who is not a town meeting member may speak, but not vote at such a meeting. A town meeting member may resign by filing a written resignation with the town clerk, and his resignation shall take effect on the date of such filing. A town meeting member who removes from the town shall cease to be a town meeting member.

SECTION 4. Nominations of candidates for town meeting members to be elected under this act shall be made by nomination papers signed by not less than thirty voters of the precinct in which the candidate resides and filed with the town clerk at least ten days before the election. No nomination papers shall be valid in respect to any candidate whose written acceptance is not thereon or attached thereto.

SECTION 5. The articles in the warrant for every town meeting, so far as they relate to the election of the moderator, town officers, and town meeting members, as hereinbefore provided, to granting licenses for the sale of intoxicating liquors, referenda, and all matters to be acted upon and determined by ballot, shall be so acted upon and determined by the voters of the town in their respective precincts. All other articles in the warrant for any town meeting shall be acted upon and determined exclusively by town meeting members at a meeting to be held at such time and place as shall be set forth by the selectmen in the war-

rant for the meeting and subject to the referendum provided for by section ten.

SECTION 6. A moderator shall be elected by ballot at each annual town meeting and shall serve as the moderator of all town meetings except as otherwise provided by law until his successor is elected and qualified. Nominations for moderator and his election shall be as in the case of other elective town officers, and any vacancy in such office may be filled by the town meeting members at a meeting held for that purpose. If a moderator is absent, a moderator pro tempore may be elected by the town meeting members.

SECTION 7. Any vacancy or vacancies in the full number of town meeting members from any precinct may be filled by appointment until the next annual election by the remaining members of the precinct from among the registered male voters thereof. Upon petition therefor, signed by not less than ten town meeting members from the precinct, notices thereof shall be promptly given by the town clerk to the remaining members from the precinct in which such vacancy or vacancies exist, and he shall call a special meeting of such members for the purpose of filling such vacancy or vacancies. He shall cause to be mailed to each of such members, not less than four days before the time set for such meeting, a notice, specifying the object and the time and the place thereof. At such meeting a majority of the members shall constitute a quorum, and they shall elect from their own number a chairman and a clerk. The choice to fill any such vacancy shall be by ballot and a majority of the votes cast shall be required for a choice. The chairman and clerk shall make a certificate of such choice and forthwith file the same with the town clerk, together with a written acceptance by the member or members so chosen, who shall thereupon be deemed elected and qualified a town meeting member or members, subject to the right of all the town meeting members to judge of the election and qualification of members as set forth in section three.

SECTION 8. If at any limited town meeting, a vote is passed authorizing the expenditure of twenty-five thousand dollars or more as a special appropriation, such vote shall not become operative until after the expiration of five days, exclusive of Sundays and holidays, from the dissolution of such meeting. If,

within the said five days a petition signed by not less than twenty voters from each precinct therein, with their street addresses, is filed with the selectmen, asking that the question or questions involved in such vote be submitted to the voters at large, the selectmen and the moderator shall, within fourteen days after the filing thereof, present the question or questions so involved to the voters at large convened in a special town meeting to be held for that purpose, at which meeting the ballot and the check lists shall be used in the respective precincts, and such question or questions shall be determined by the vote of a majority of such voters at large of the town voting thereon at such special town meeting. If such petition be not filed within the said period of five days, the vote in the limited town meeting authorizing such expenditure shall become operative upon the expiration of the said period.

SECTION 9. The municipal corporation of a town, after the acceptance of this act, shall have the capacity to act through and to be bound by its said town meeting members who shall, when convened from time to time as hereinunder provided, constitute limited town meetings; and such limited town meetings shall exercise exclusively, so far as shall conform to the provisions of this act, all powers vested in the municipal corporation of the town. Action in conformity with all provisions of law now or hereafter applicable to the transaction of town affairs in town meetings shall, when taken by any limited town meeting in the town in accordance with the provisions of this act, have the same force and effect as if said action had been taken in a town meeting, open to all the voters of said town, as heretofore organized and conducted.

SECTION 10. This act shall not abridge the right of the voters or citizens of a town to hold general meetings according to any right secured to them by law or by the Constitution of the Commonwealth; nor shall this act confer upon any limited town meeting the power finally to commit the town to any measure affecting its municipal existence or making any change in the form of its government, without action thereon by the voters of the town at large.

SECTION 11. Upon petition of ten per cent of the registered male voters of a town filed with the selectmen at any time within thirty days prior to any annual town meeting, this act shall be

submitted to the voters of the town at such meeting. The act shall be submitted in the form of the following question to be placed on the official ballot:—"Shall chapter of the acts of 1918 relative to limited town meetings be accepted by the town of ?" If a majority of the voters voting thereon vote in the affirmative, this act shall take effect in that town; otherwise, it shall not take effect.

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the undersigned Justices of the Supreme Judicial Court, have considered the questions, of which a copy with the order relating thereto is hereto annexed, and respectfully submit this opinion:

The questions and the accompanying bill relate to the power of the General Court under the Constitution to enact a general statute abolishing the town meeting form of government and substituting for it a qualified kind of municipal meeting wherein the power to vote shall be exercised alone by certain representative voters, consisting of a percentage of the total number, chosen by their fellows from precincts into which the town is to be divided, such statute to take effect automatically in any town when accepted by the affirmative votes of a majority of the voters at a duly warned town meeting.

The essential and distinguishing characteristic of the town meeting form of government is that "all the qualified inhabitants meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers." *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 84, 101. Each qualified inhabitant of the town has an indisputable right to vote upon every question presented, as well as to discuss it, or there is no town meeting. This is universally understood as the vital feature of the town system of government as practiced in this Commonwealth continuously from a time long before the Declaration of Independence until the present. This form of local government was the fibre of our institutions when the Constitution was adopted. It is implied whenever the word "town" is used in that instrument. It was held in profound esteem and was guarded with jealous care. The public spirit in Massachusetts which led to the opening battles

of the Revolution was nurtured and promoted in large measure by the deliberations and votes in the various town meetings. *Wheelock v. Lowell*, 196 Mass. 220, 227.

It is manifest that this vital feature of the right of each qualified citizen to vote upon every question coming before the town meeting is not preserved in the bill proposed. It was considered doubtful in the early days of the Commonwealth whether the Constitution as originally adopted permitted any substantial change by the General Court in the town meeting form of local government. This doubt prevailed so generally that the second amendment to the Constitution was proposed by the convention of 1820 and was adopted by the people. The purpose and effect of that amendment, reported by a committee of which Daniel Webster was chairman, were clearly set forth by Lemuel Shaw, afterwards Chief Justice, who as a member of that convention was its leading supporter. In debate he pointed out that "The Constitution, as it stands, requires a form of town government, not adapted to the condition of a populous town. The inhabitants of towns meet together for the purpose of giving their votes for town, county, State, and United States officers. In these cases the meeting is not deliberative. But they have another class of duties, which consists in deliberating and acting upon all questions falling within their jurisdiction, in which cases they are to be considered in all respects as deliberative bodies. But the Constitution provides that the inhabitants shall meet and the votes be given in open town meeting; that the votes shall be counted, sorted and declared in open town meeting, in which the selectmen shall preside. These provisions render it imperative that the voters should meet together in one body, be they few or many.

. . . This then is the essential difficulty. The General Court can grant powers as occasion may require, but cannot dispense with the mode of organization required by the Constitution. What then is the remedy? It is to authorize such an organization as is adapted to the condition of a numerous people, — such an organization as will admit the inhabitants to meet in sections for the purposes of election, and choose representatives who should meet for the purpose of deliberation, instead of the whole body." *Journal Mass. Convention of 1820-21*, page 193. That statement of the matter does not appear to have been disputed, but on

the contrary to have been generally approved in the convention, among whose members were most of the leading constitutional lawyers of the State, including a justice of the Supreme Court of the United States, the chief justice and two associate justices of this court, and three others who subsequently became members of this court. That exposition of the law was adopted in substance in *Hill v. Boston*, 122 Mass. 344, 354-356, and was recognized in *Larcom v. Olin*, 160 Mass. 102, 104. The town is the unit for voting purposes recognized by the Constitution. An amendment was required to permit the division of a town into voting precincts. Article 29.

The fundamental and real distinction between the town and the city organization is that in the former all the qualified inhabitants meet together to deliberate and vote as individuals, each in his own right, while in the latter all municipal functions are performed by deputies. The one is direct, the other is representative. The second amendment to the Constitution provides the only method by which the General Court can erect the representative in place of the direct form of municipal government. The power conferred upon the General Court by the second amendment is restricted so "that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose." It is plain that the proposed bill is not framed in accordance with that amendment. Its provisions are not limited to towns of twelve thousand inhabitants as thereby required, but are quite unhampered in that particular. The smallest town may adopt it. Moreover, the establishment of a city or other municipal government, representative in its nature, cannot be made by general law but only by special act, passed on the application of the town pursuant to a majority vote of its inhabitants voting thereon. The reason for that is that under the second amendment the first step must be taken in each instance by the town and not by the General Court. This course is reversed when a general law is held out for adoption at any time by any town. That was decided in *Larcom v. Olin*, 160 Mass. 102. It is unaffected by art. 42 of the Amendments to the Constitu-

tion permitting a general referendum. Different rules apply respecting a change from one form of representative municipal government to another after the fundamental transition from the town to the representative form has been made in accordance with the terms of the second amendment. Such a change may be made under the provisions of a general act. *Cunningham v. Mayor of Cambridge*, 222 Mass. 574, 576. It is an immaterial circumstance that in the proposed bill the name "town" is retained as descriptive of the municipal organization. It is the substance of the thing done, and not the name given to it, which controls. It is plain that the proposed bill extinguishes the essential characteristic of the town form of government as universally understood, and sets up in its place in certain respects a kind of representative form of government. In the second amendment the words "corporate town or towns," of the perfectly well known meaning already adverted to, are used in contrast to the words "municipal or city government," which are generic in signification and include all forms of representative municipal government. To call the municipal organization established by the proposed bill, "town," cannot modify its essential governmental nature.

We are constrained to answer each of the questions in the negative.

Owing to absence from the Commonwealth Mr. Justice Pierce has taken no part in the consideration of the questions.

ARTHUR P. RUGG.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

CHARLES A. DE COURCY.

JOHN C. CROSBY.

JAMES B. CARROLL.

INDEX.

ABATEMENT.

Of an action at law, see that subtitle under PRACTICE, CIVIL.

ACCORD AND SATISFACTION.

In an action of contract, it was said that, the burden being on the plaintiff to prove the contract and the letters by which the contract was made showing the extinction of a charge of \$900 by an agreement to pay \$200 a month in the coming year, there was no ground for saying that the burden was on the defendant to prove a defence of accord and satisfaction. *Tuttle v. Metz Co.* 272.

ACTIONABLE TORT.

An assurance, that by putting \$300 into a "voting contest" the person to whom the statement is addressed will "win the automobile and also the grafonola that was put up as a special prize," is not a statement by words or conduct of present or past material facts, but is a mere promise or conjecture as to future events and, if the prophecy is proved to have been a false one made with the intention to deceive and to have been relied upon, this does not give a right of action in tort for deceit. *Brown v. C. A. Pierce & Co. Inc.* 44.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERTISEMENT.

A statement in an editorial published in a newspaper, that the owner of the paper for years had guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default. *Heathcote v. Curtis Publishing Co.* 569.

AGENCY.

Existence of Relation.

The general contractor for the construction of a building, who himself was a mason and who had made a contract with a subcontractor for all the car-

Agency (*continued*).

penter work of the building, by going to the building in process of construction after the mason work was completed for the purpose of seeing that the subcontractors performed their work in accordance with their contracts, did not make himself liable for an injury caused by the negligence of an employee of the subcontractor for the carpenter work. *Kettleman v. Atkins*, 89.

In an action against the general contractor for such injury, the plaintiff called the defendant as a witness, and he on his direct examination made a statement that all the persons who worked on the building did so under his direction, but, it being plain that he was referring to the subcontractors and not to the men in their employ, it was held that this was no evidence that he was responsible for the injury. *Ibid*.

Where at the trial of an action of contract a material issue is, whether a certain agreement for the sale of real estate, purporting to be signed and sealed by the defendant's husband as her agent, was authorized by her, testimony of a witness, that at a trial of another action between different parties he heard the defendant testify that she gave full authority to her husband to do with the property as he pleased, is admissible. *Siegel v. Thern*, 172.

The circumstances of the hiring of a journeyman paper hanger by the foreman of the wall paper department of a corporation conducting a department store were held to warrant a finding, upon a claim by him under the workmen's compensation act for compensation for an injury sustained in the course of his work by a fall from a stepladder, that at the time of his injury he was in the employ of the corporation and was not an independent contractor within the meaning of St. 1911, c. 751, Part III, § 17. *McAllister's Case*, 193.

In an action against a machine company for injury to the plaintiff's horse and wagon from being run into by a motor truck belonging to the defendant by reason of the negligence of the driver of the truck, where it appeared that a milk company had hired the motor truck from the defendant and that it was driven by an employee of the milk company, it was held that a failure of the manager of the defendant to reply to a statement of the agent of the milk company, "I told him that, if I put on my driver, he would have to be responsible for it," even if it was evidence of an implied assent to the proposition made to him, was not evidence that the driver was the servant of the defendant, which never had hired him. *Melchionda v. American Locomotive Co.* 202.

Upon the evidence at the trial of an action of tort against a firm of insurance brokers for damages resulting from negligence of another broker, alleged to have been the defendant's agent, in failing to procure an assent of an insurance company to a change of location of furniture insured by the company through the agency of the defendants, it was held that findings were warranted that, in taking the plaintiff's policy and undertaking to procure the company's assent, the agent was acting as an agent for the defendants and within the scope of his authority. *Damon v. Kaler*, 215.

Evidence in an action against the general manager of a corporation conducting ten lunch rooms by a traveller who was run into by a motor car owned by him which he had lent to the assistant manager of the same corporation, was held not to warrant a finding that the assistant manager was

acting as the agent of the defendant in driving the car, both he and the defendant being servants and agents of the corporation in whose employ they acted in different capacities. *Santoro v. Bickford*, 357.

In the case above described testimony of the defendant that at the time of the accident the assistant manager was acting under his general direction and evidence that the assistant manager reported the accident to the defendant were held not to warrant a finding that the assistant manager was acting as the agent of the defendant in driving the car for the purpose of collecting the daily cash receipts of the corporation that employed him. *Ibid.*

Scope of Authority or Employment.

Where a husband, before obtaining a divorce from his wife for desertion, made use of a power of attorney, given to him by her before she left her home, to convey her real estate through a third person to himself, it was held that the wife could maintain a suit in equity against her former husband to set aside the conveyance, the authority given by the power of attorney being restricted necessarily and designed for the benefit of the owner of the real estate and conferring on the husband no right to convey the property to himself for his own advantage to the detriment of the owner. *English v. English*, 11.

Dependent widow of an employee of a city that had accepted St. 1913, c. 807, who was injured while upon a steam roller hired by the city for work on its highways, its owner furnishing the "engineer, coal, wood and steam," was held not to be entitled to claim compensation under the workmen's compensation act, because the injuries that caused the death of the employee did not arise out of or in the course of his employment. *O'Toole's Case*, 165.

Upon the evidence at the trial of an action of tort against a firm of insurance brokers for damages resulting from negligence of another broker, alleged to have been the defendant's agent, in failing to procure an assent of an insurance company to change of location of furniture insured by the company through the agency of the defendants, it was held that findings were warranted that, in taking the plaintiff's policy and undertaking to procure the company's assent, the agent was acting as an agent for the defendants and within the scope of his authority. *Damon v. Kaler*, 215.

Contention, that the requirement of a five days' notice in writing as a condition precedent to the enforcement of a claim for damages in the transportation of a horse had been waived by the station agent of the carrier who was on the platform when the horse arrived, was held to be unfounded because it was not shown that the station agent had any authority to waive the requirement. *Fletcher v. New York Central & Hudson River Railroad*, 258.

One who knows that he is dealing with a special agent is bound to ascertain the nature and extent of his authority. *Cauman v. American Indemnity Co. of New York*, 278.

A general agent of a credit insurance company has no power or authority by an oral agreement to dispense with or override an express agreement made with the insurance company by an applicant for a policy of credit insurance in his written application for the insurance. *Ibid.*

Agency (continued).

Requirement of a covenant in a lease of the third floor of a building that an elevator should be used for freight purposes only, was held not to have been waived by reason of permissions given by the janitor, where there was no evidence that the janitor had any authority to modify the provisions of the lease and no evidence that the defendant had any knowledge of the violation of the covenant. *Follins v. Dill*, 321.

In an action by a physician for charges for services rendered to the wife and minor child of the defendant, where there is evidence that the defendant knew that the services were being rendered, and no evidence that the defendant ever had forbidden the plaintiff to render or his wife or child in the plaintiff's presence to receive the services of the plaintiff on his account, certain private instructions of the defendant to his wife were held not to rebut the presumption of the agency of the wife to pledge her husband's credit for medical services that are reasonably necessary for her or the family. *Vaughan v. Mansfield*, 352.

Therefore in such an action it is right for the presiding judge to refuse to rule at the request of the defendant "that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself." *Ibid*.

An attorney at law has no authority to bind his client by assenting to the discharge from arrest of a judgment debtor of the client without payment in full of the judgment, unless it was done with the personal knowledge and consent of the client as judgment creditor. *Hahn v. Loker*, 363.

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, it appeared that the authority of the treasurer of the corporation was limited, and it was held that he had no authority to bind the corporation by his letters, accounts, statements or bookkeeping entries, so that evidence of that character should not have been admitted. *Amory v. Amherst College*, 374.

Undisclosed Principal.

Where services are rendered and money is paid for a person who afterwards turns out to have been the agent for an undisclosed principal, an action for the services and money brought against the agent, in which judgment is entered and execution issued while the plaintiff still is ignorant of the existence of the principal, if the judgment is wholly unsatisfied, is not an exercise of the plaintiff's right of election to hold the agent, and, therefore, is no bar to an action for the same services and money brought against the principal when he has become known. *Gavin v. Durden Coleman Lumber Co.* 576.

Agent's Duty of Fidelity.

If a broker, employed by an owner of real estate to procure an exchange of that real estate for certain real estate in another city, makes a secret agreement to pay one half of his commission to the broker who represents the other party to the exchange, this is a fraud on the party employing the other broker and makes the contract of agency one contrary to public policy which cannot be enforced, and the first broker cannot recover from

his own customer his commission for procuring the exchange of real estate.
Tracey v. Blake, 57.

If, at the trial of an action by a real estate broker for his commission, there is evidence tending to show that the plaintiff did not disclose to the defendant a material fact which he learned while acting in the course of his duties as the defendant's broker, the defendant in order to rely on the defence of want of fidelity of the plaintiff must call the attention of the trial judge specifically to such a contention either by a request for a ruling or in some other way. *Wheelock v. Zevitas*, 167.

If he does not do so, he cannot raise the contention for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover. *Ibid*.

In this case it was said that the information which the plaintiff did not communicate to the defendant did not appear to have been in regard to a fact of material importance to the defendant. *Ibid*.

Ratification of Agent's Acts by Principal.

In an action to recover the price of hats and veils furnished to infant daughters of the defendant to wear at the funeral of their mother, if it appears "that the defendant neither expressly nor impliedly authorized the purchase of the goods," but it appears that he permitted his minor daughters to use the articles, which were purchased by them from the plaintiff with his knowledge, and that he afterwards offered to pay a certain price for the articles, which his daughters asserted was the agreed price, it can be found that he adopted and ratified the purchase. *Bisbee v. McManus*, 124.

Agent's Compensation.

Broker's commission, see BROKER.

Credibility of Agent as Witness for Principal.

Where a witness for a party to an action has testified that he was in the employ of that party when the events to which he has testified occurred, it is right for the presiding judge to instruct the jury that they may consider the fact that the witness was in the employ of the party at the time referred to in determining the degree of credibility to be given to his testimony.
Mikkelsen v. Connolly, 360.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

Officers and Agents of Corporations.

See appropriate subtitle under CORPORATION.

AMENDMENT.

See that subtitle under PRACTICE, CIVIL.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

ASSIGNMENT.

Whether the formation, by several persons holding separate licenses from a town for the planting, growing and digging of oysters, of a partnership whereby the partners carried on the business of oyster fishing under all the grants "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment of the licenses as, under R. L. c. 91, § 107, required the written consent of the selectmen of the town, so that under § 110 of that chapter, in default of such consent, the business might have been declared forfeited upon objection by the Commonwealth, was not decided in this case. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

If such an objection has not been raised and enforced by the Commonwealth, it cannot successfully be raised by the Boston, Cape Cod and New York Canal Company in a proceeding under St. 1899, c. 448, § 16, for the assessment of damages resulting to such a fishery by acts of the canal company in the construction of its canal. *Ibid.*

ATTACHMENT.

It was pointed out that a claim for unliquidated damages arising from a breach of a contract cannot be reached to be attached or taken on execution in an action at law against the plaintiff by one of his creditors. *Digney v. Blanchard*, 235.

ATTORNEY AT LAW.

It being a criminal offence for a disbarred attorney to continue to practice law, a petition by him for a writ of mandamus to compel a justice of the Superior Court to recognize him as an attorney at law and as counsel for the plaintiff in a suit in equity called for hearing before the justice must be denied. *Casey v. Justice of the Superior Court*, 200.

While it would be proper, upon the hearing of a petition for a writ of mandamus commanding a justice of the Superior Court to recognize the petitioner as an attorney at law and counsel for the plaintiff in a suit pending for hearing before him, for the Attorney General to appear for the respondent, he is not required so to act, and it is proper for the respondent to be represented by members of the bar of the Commonwealth who hold no other official position in the Commonwealth. *Ibid.*

An attorney at law has no authority to bind his client by assenting to the discharge from arrest of a judgment debtor of the client without payment in full of the judgment, unless it was done with the personal knowledge and consent of the client as judgment creditor. *Hahn v. Loker*, 363.

ATTORNEY GENERAL.

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tioner as an attorney at law and counsel for the plaintiff in a suit pending for hearing before him, for the Attorney General to appear for the respondent, he is not required so to act, and it is proper for the respondent to be represented by members of the bar of the Commonwealth who hold no other official position in the Commonwealth. *Casey v. Justice of the Superior Court*, 200.

AUDITOR.

See appropriate subtitle under PRACTICE, CIVIL.

AUTOMOBILE.

See MOTOR VEHICLE.

BAILMENT.

Where in the crowded lobby of a theatre a person was handed a box containing a pair of diamond earrings and was asked to examine and appraise them without reward and where as he was handling them he "dropped one of the earrings and it was lost," such person, who was only the gratuitous bailee of the earrings, cannot be held liable to their owner for the loss, there being no evidence to warrant a finding of gross negligence on his part. *Rubin v. Huhn*, 126.

In an action for conversion of the above earrings there was evidence that the plaintiff demanded of the defendant the return of the earrings and that the defendant then said that, if the plaintiff would refrain for a short time from bringing an action against the defendant for the loss of the earrings, he would pay the plaintiff for them a sum of money named, that the plaintiff did so refrain for such time but that the defendant did not pay to the plaintiff the sum named nor return both or either of the earrings, and it was held that there was no evidence of a conversion of both earrings by the defendant. *Ibid*.

Evidence in the action above described, that the defendant, being in possession of the remaining earring, refused upon the plaintiff's demand to deliver it to the plaintiff, and that the defendant delivered this remaining earring to a person not authorized to receive it, was held to warrant a finding that there was a conversion by the defendant of the remaining earring. *Ibid*.

In the same case it was held that, as the defendant properly could be held liable for the value of one earring at the time of its conversion, the trial judge was right in refusing to rule "that upon all the evidence judgment must be directed for the defendant." *Ibid*.

BANK.

SAVINGS BANK, see that title.

BANKRUPTCY.

A deed conveying property to a trustee to pay the income to the settlor during his life and upon his death leaving no issue "to distribute said trust fund among those who would take his real and personal property if he had then died intestate," was held not to give to a bankrupt brother a vested

Bankruptcy (continued).

interest in the trust fund before the persons who were to take that fund were determined upon the death of the settlor, so that, after the death of the settlor, the trustee in bankruptcy of the brother, who was the next of kin and had been declared a bankrupt before the settlor's death, had no claim upon the fund. *Hall v. Farmer*, 103.

In an action of contract, where the plaintiff would be entitled to a judgment but for the discharge in bankruptcy of the defendant pleaded as a defence to the action, the plaintiff upon motion is entitled to an order to have judgment entered for him in the sum ascertained, such judgment not to be enforced against the bankrupt personally or to be operative beyond such value as the bankruptcy act attributes to it as evidence of the amount due as a provable claim in bankruptcy, and that execution on said judgment be stayed perpetually. *Barry v. New York Holding & Construction Co.* 308.

BASTARDY.

After a bastardy proceeding under R. L. c. 82, begun on complaint of the mother, has been dismissed by agreement of the complainant and the putative father, it is too late for the overseers of the poor of the municipality wherein the mother has a settlement to intervene to prosecute the complaint. *Commonwealth v. Kenney*, 157.

St. 1913, c. 563, relative to illegitimate children and their maintenance, does not apply to a motion and application by the overseers of the poor of the municipality wherein the mother of such a child has a settlement to be permitted to intervene to prosecute a bastardy proceeding under R. L. c. 82, begun in January, 1913, on complaint of the mother relative to a child born in 1912 and dismissed on July 18, 1913, by agreement of the mother and the putative father, because by § 9 of the statute it does not affect proceedings begun before July 1, 1913. *Ibid.*

The rights given to a municipality by R. L. c. 82, § 18, which provides that no settlement made by the father and mother of an illegitimate child shall relieve the father from liability to any city or town or the Commonwealth for the support of the child, cannot be enforced by permitting the overseers of the poor to intervene to prosecute a proceeding, begun under that chapter on complaint of the mother, after that proceeding has been dismissed by agreement of the mother and the putative father. *Ibid.*

BILL OF LADING.

Where a customer of a salt company ordered from the company a certain amount of salt at an agreed price "F. O. B. cars, Boston" and the company shipped by rail to Boston, under a bill of lading in which the company itself was named as the consignee, a larger amount of salt than that required by the customer's order and indorsed on the bill of lading an order to "Deliver to order of" the customer, this was held to indicate an intent on the part of the seller to reserve to itself the right of disposing of the salt until the railroad company in Boston in behalf of the seller and in the exercise of the authority conferred by the indorsement on the bill of lading should appropriate and deliver to the customer from the mass the quantity and kind of salt ordered by him. *Rock Glen Salt Co. v. Segal*, 115.

BILLS AND NOTES.

Validity.

It is no ground for maintaining a suit in equity to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, that the promissory notes on which the judgment was obtained were executed on Sunday and that the plaintiff had an absolute defence to the action. *Joyce v. Thompson*, 106.

BLASTING.

Action for damages caused by negligent blasting operations, see appropriate subtitle under NEGLIGENCE.

BOARD OF HEALTH.

It was said that an order of the health department of Boston, addressed to a landowner who has been using a private drain, ordering him to make a connection with the public sewer in the adjoining street, does not require him to abandon the use of the private drain, where the order contains no prohibition of its use. *Pearl v. Whitcomb*, 181.

BOND.

To dissolve Attachment or Injunction or Lien.

It is no bar to the granting of a motion for a special judgment against a bankrupt defendant to enable the plaintiff to bring an action against the sureties on a bond given by such defendant to dissolve an attachment of funds in the hands of a trustee summoned by trustee process, that the same plaintiff also had made a motion for a special judgment upon a bond given to dissolve an attachment by special precept of personal property of the bankrupt, which bond the plaintiff did not file but relied upon as a common law bond, and that that motion had been denied. *Cinamon v. St. Louis Rubber Co.* 33.

Upon the motion described above, where the two bonds mentioned created independent liabilities and the sureties upon them were not the same, it was said, that the remedies on the two bonds were not inconsistent and that the plaintiff had a right of action upon each of them, but that, if they had been inconsistent and the plaintiff had been mistaken in supposing that he had two such rights and had chosen the one to which he was not entitled, this would not bar him from exercising the other right if he was entitled to it. *Ibid.*

BOSTON.

It was said that an order of the health department of Boston, addressed to a landowner who has been using a private drain, ordering him to make a connection with the public sewer in the adjoining street, does not require him to abandon the use of the private drain, where the order contains no prohibition of its use. *Pearl v. Whitcomb*, 181.

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract. *McGovern v. Boston*, 394.

In making such a contract in the name of the city, the members of the Boston transit commission act as public servants and not as servants or agents of the city. *Ibid.*

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which bids for the work were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract. *Ibid.*

If, to procure as low a bid as possible from the contractor, the members of the commission wilfully misled and deceived him as to material facts and concealed the true state of affairs from him, so that he was led to make a contract for a sum too small, the city is not responsible for such misconduct on the part of the members of the commission, who are public officers, and such misconduct is no ground for a rescission of the contract. *Ibid.*

Since St. 1911, c. 741, § 17, requires that a contract for work in the construction of the Dorchester tunnel, which involves \$2,000 or more in amount, shall be in writing and signed by a majority of the Boston transit commission, a contractor cannot recover from the city upon a *quantum meruit* for a sum in excess of \$2,000 where he contends that a contract in writing for such work was invalid. *Ibid.*

Although St. 1911, c. 741, § 17, does not expressly prohibit recovery from the city upon an implied contract under the circumstances above described, it is the only reasonable inference from its provision that all contracts coming within its terms must be in writing. *Ibid.*

BOSTON TRANSIT COMMISSION.

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract. *McGovern v. Boston*, 394.

In making such a contract in the name of the city, the members of the Boston transit commission act as public servants and not as servants or agents of the city. *Ibid.*

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which bids for the work were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract. *Ibid.*

If, to procure as low a bid as possible from the contractor, the members of the commission wilfully misled and deceived him as to the material facts and concealed the true state of affairs from him, so that he was led to make a contract for a sum too small, the city is not responsible for such misconduct on the part of the members of the commission, who are public officers, and such misconduct is no ground for a rescission of the contract. *Ibid.*

BROKER.

If a broker, employed by an owner of real estate to procure an exchange of that real estate for certain real estate in another city, makes a secret agreement to pay one half of his commission to the broker who represents the other party to the exchange, this is a fraud on the party employing the other broker and makes the contract of agency one contrary to public policy which cannot be enforced, and the first broker cannot recover from his own customer his commission for procuring the exchange of real estate. *Tracey v. Blake*, 57.

In the case above described it was said that it was not necessary to determine whether the contract entered into by the plaintiff with the other broker was a violation of St. 1909, c. 514, § 28, and thereby was made a criminal offence. *Ibid.*

The mere fact, that two persons held themselves out as partners doing business as real estate brokers and could be considered such by their creditors, is not a bar to an action brought by one only of them for a commission as broker, if it does not also appear that by agreement between themselves they were partners. *Wheelock v. Zevitas*, 167.

Where the evidence as to such an agreement is conflicting, the question of its existence is for the jury. *Ibid.*

Where, at the trial of an action upon an account annexed for commissions alleged to have been earned by the plaintiff as a real estate broker, there is evidence tending to show that the plaintiff as a broker contracted with the defendant to procure for him for certain commissions a lease to him of certain buildings and tenants who should sublet from the defendant, that the leases and tenants were obtained, that the plaintiff performed his part of the contract and that the defendant refused to pay him, the question of the defendant's liability is for the jury. *Ibid.*

Where, at the trial of an action upon a *quantum meruit* for the value of services as a real estate broker, there was evidence that the plaintiff agreed to secure for the defendant a lease for which he was to receive a certain commission, but not until the premises were rented for as much as or more than the defendant paid for his lease, but that the defendant, by his lack of diligence and failure to aid the plaintiff, prevented the property from making such return, it was held that the plaintiff had a right to go to the jury on the question whether he should recover the value of his services. *Ibid.*

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker under a special contract which conduct of the defendant prevented him from performing, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them. *Ibid.*

If, at the trial of an action by a real estate broker for his commission, there is evidence tending to show that the plaintiff did not disclose to the defendant a material fact which he learned while acting in the course of his duties as the defendant's broker, the defendant in order to rely on the defence of want of fidelity of the plaintiff must call the attention of the trial judge

Broker (*continued*).

specifically to such a contention either by a request for a ruling or in some other way. *Wheelock v. Zevitas*, 167.

If he does not do so, he cannot raise the contention for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover. *Ibid*.

In this case it was said that the information which the plaintiff did not communicate to the defendant did not appear to have been in regard to a fact of material importance to the defendant. *Ibid*.

CAMBRIDGE.

The adoption by the city of Cambridge of the Plan B form of city government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of the city subject to the civil service laws. *Ellis v. Civil Service Commissioners*, 147.

CAPE COD CANAL.

Damages to which the owners or licensees of oyster fisheries injured by the Boston, Cape Cod and New York Canal Company in the construction of its canal are entitled under St. 1899, c. 448, § 16. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

CARRIER.

Of Passengers.

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

Of Goods.

A provision in a contract in writing between the owner of a horse and a railroad corporation for the transportation of the horse, which made a condition precedent to the enforcement of a claim for damages the giving of a certain five days' notice in writing, was held not to be unreasonable and to be valid. *Fletcher v. New York Central & Hudson River Railroad*, 258.

A contention that the above requirement had been waived by the station agent of the carrier who was on the platform when the horse arrived was held to be unfounded because it was not shown that the station agent had any authority to waive the requirement. *Ibid*.

In the same case it was said that it was not necessary to consider whether the rule, that a carrier has no right to waive a provision in a contract for interstate transportation, which is filed with its tariff schedules, requiring a notice in writing within a certain time, applies to a similar provision in a contract for intrastate transportation, which has been filed in a like manner. *Ibid*.

CHILD.

See PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

After the acceptance by a city of St. 1911, c. 468, every member of the police department of that city is subject to the civil service laws and the rules made thereunder whether he is the head of the police department or an ordinary patrolman. *Ellis v. Civil Service Commissioners*, 147.

The adoption by the city of Cambridge of the Plan B form of government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of the city subject to the civil service laws. *Ibid.*

Under the provision of the city charter of Lowell contained in St. 1911, c. 645, § 40, the treasurer and collector of taxes of that city can be removed from office by the municipal council only in the manner provided in the civil service law contained in St. 1904, c. 314, as amended by St. 1905, c. 243. *Stiles v. Municipal Council of Lowell*, 208.

Peremptory writs of mandamus were ordered to issue on petitions by the treasurer and collector of taxes and the purchasing agent of the city of Lowell, who alleged that they were removed from office contrary to the provisions of the civil service law. *Ibid.*

CLERK OF COURTS.

A trial judge has power to order the correction of the docket record by the entering *nunc pro tunc* of an order previously made by the court, which through inadvertence had not been entered on the docket by the clerk. *Follins v. Dill*, 321.

CLUB.

Action by one who had been a member of an incorporated social club against the members of the governing committee of the club for the alleged unlawful expulsion of the plaintiff. *Richards v. Morison*, 458.

COAL HOLE.

See that subtitle under NEGLIGENCE.

COMITY.

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York, whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it

Comity (*continued*).

was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

COMMONWEALTH.

In an action by the Treasurer and Receiver General for support of a pauper, which properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither lived nor had his usual place of business in that county, it was said that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise the objection either by a plea or answer in abatement or by a motion to dismiss. *Treasurer & Receiver General v. Sermini*, 248.

CONFLICT OF LAWS.

Where, at the trial of an action for breach of a warranty of the quality of oats sold by the defendant to the plaintiff and to be delivered to the plaintiff at a city in New Hampshire, there is no evidence of the law of that State, the rights of the parties are to be determined at common law. *Cavanaugh v. D. W. Ranlet Co.* 366.

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York but whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

CONSPIRACY.

In an action by a physician against his landlord, to whom he owed rent, and a constable, to whom the landlord made a lease to terminate the plaintiff's tenancy at will, and a real estate agent, who obtained tenants for the defendant landlord, for an alleged unlawful conspiracy to injure the plaintiff by evicting him from the house in which he lived and had his office as a tenant at will of one of the defendants, it was held that there was no evidence for the jury that the defendants conspired to do any unlawful act or to do any lawful act by unlawful means. *De Wolfe v. Roberts*, 410.

In the action above described, it was held that the landlord's motive for doing the lawful act of giving a lease to the constable was immaterial and had no bearing upon proof of a conspiracy. *Ibid.*

CONSTITUTIONAL LAW.

Police Power.

The statute contained in R. L. c. 56, §§ 57, 62, as amended by St. 1910, c. 641, §§ 1, 2, relating to the sale of milk below standard is not class legislation and does not violate any right secured by the Constitution of the United States. Following *St. John v. New York*, 201 U. S. 633. *Commonwealth v. Titcomb*, 14.

Nor is the statute described above in contravention of any provision of the Constitution of the Commonwealth. *Ibid.*

Taxation.

It was held that there was nothing in the statutes that authorize the collection of a tax from a certain foreign corporation, using personal property in this Commonwealth to carry out a contract for lighting certain city streets and parks, which violates any provision of the Fourteenth Amendment to the Constitution of the United States. *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.* 494.

Fair Trial.

Suggestions by a presiding judge, in the midst of a trial and not in the hearing of the jury, of a compromise was held to be in no way inconsistent with the proper performance of his duties, and certain remarks by him, among other things naming an amount, fairly construed were held not to mean that the case had been prejudged by him in violation of art. 29 of the Declaration of Rights. *Harrington v. Boston Elevated Railway*, 421.

Trial by Jury.

Neither by constitutional provision nor by statute is a petitioner for a writ of mandamus given a right to trial by jury of issues of fact raised by the pleadings. *Casey v. Justice of the Superior Court*, 200.

It here was pointed out as manifest that an ordinary action of contract is a controversy concerning property, for which the right to a trial by jury is assured by art. 15 of the Declaration of Rights. *Farnham v. Lenox Motor Car Co.* 478.

The provision of Rule 31 of the Superior Court, relating to auditors, is not in conflict with the right to a trial by jury as guaranteed by art. 15 of the Declaration of Rights, and, where it appears that a trial by jury has been claimed seasonably by a party to an action and is insisted on by such party, and where there is a real issue of fact to be tried, a cause is shown under the rule why judgment should not be entered on the auditor's report. *Ibid.*

Where the jury trial properly has been claimed and there is nothing to show that the party claiming it and opposing the auditor's report and the motion may not have evidence to controvert the auditor's findings, the court has no power to grant the motion. *Ibid.*

In the case in which the point above stated was decided, it was pointed out

that assent to the appointment of an auditor or a failure to object to such a reference is not a waiver of a claim for a trial by jury which already has been filed seasonably. *Farnham v. Lenox Motor Car Co.* 478.

Post Roads.

U. S. St. 1884, c. 9, relating to post routes, does not contravene the rule that the public ways laid out and maintained by the Commonwealth and its subdivisions can be altered or discontinued only by the authorities that laid them out and that such authorities also have the power of supervision and control inherent in the Commonwealth and can make and enforce reasonable regulations for the use of such public ways. *Commonwealth v. Closson*, 329.

Certain regulations by street commissioners and park commissioners as to use of highways were held to be reasonable and constitutional and their violation properly punishable as a criminal offence. *Ibid.*

The regulations relating to the operation by drivers of vehicles on the public ways, which are mentioned above, are reasonable and constitutional and their violation properly is punishable as a criminal offence. *Ibid.*

Town Meeting.

Under the Constitution of the Commonwealth and the second amendment thereof the Legislature has no power to pass a general law enabling such towns as may adopt its provisions to substitute for the town meeting form of government, in which every qualified voter of the town may participate, a form wherein the town meeting shall consist of a certain percentage of the voters elected as town meeting members, so called, by the voters at large. *Opinion of the Justices*, 601.

CONTEMPT.

Proceedings for contempt for violation of a temporary injunction, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

CONTRACT.

What constitutes.

A memorandum, sent by a seller to a purchaser and containing the terms of a proposed sale and the words "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire," and "If any error in above please advise by return mail," is an offer to sell the goods, upon an acceptance of which by the prospective purchaser a binding sale would arise. *Cavanaugh v. D. W. Ranlet Co.* 366.

It could not be ruled as a matter of law that the mere failure of the prospective purchaser to reply to the memorandum above described effected an acceptance so that a binding sale resulted, and, in an action on the alleged contract, it is for the jury to say whether under all the circumstances the silence of the alleged purchaser amounted to an assent. *Ibid.*

In an action of contract to recover the sum of \$250 according to a certain contract in writing by the defendant, it appeared that the plaintiff agreed

orally to do all the things for which the \$250 was to be paid and it was held that a finding was warranted that the oral agreement testified to by the plaintiff made the contract a bilateral one, and that by its terms the defendant promised to pay \$250 forthwith in consideration of the plaintiff's promise and before performance by the plaintiff. *Massachusetts Biographical Society v. Russell*, 524.

A statement in an editorial published in a newspaper, that the owner of the paper for years has guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default. *Heathcote v. Curtis Publishing Co.* 569.

Validity.

If a broker, employed by an owner of real estate to procure an exchange of that real estate for certain real estate in another city, makes a secret agreement to pay one half of his commission to the broker who represents the other party to the exchange, this is a fraud on the party employing the other broker and makes the contract of agency one contrary to public policy which cannot be enforced, and the first broker cannot recover from his own customer his commission for procuring the exchange of real estate. *Tracey v. Blake*, 57.

In the case above described it was said that it was not necessary to determine whether the contract entered into by the plaintiff with the other broker was a violation of St. 1909, c. 514, § 28, and thereby was made a criminal offence. *Ibid.*

A provision in a contract in writing between the owner of a horse and a railroad corporation for the transportation of the horse, which made a condition precedent to the enforcement of a claim for damages the giving of a certain five days' notice in writing, was held not to be unreasonable and to be valid. *Fletcher v. New York Central & Hudson River Railroad*, 258.

The fact that a trustee under a will has authority under the will to make a sale of real estate of the trust without a license from the Probate Court does not affect the validity of a requirement in a contract of sale made by the trustee of the procuring of a license from the Probate Court as a condition precedent to a sale. *Grennan v. Pierce*, 292.

Construction.

Where a customer of a salt company ordered from the company a certain amount of salt at an agreed price "F. O. B. cars Boston" and the company shipped by rail to Boston, under a bill of lading in which the company itself was named as the consignee, a larger amount of salt than that required by the customer's order and indorsed on the bill of lading an order to "Deliver to order of" the customer, this was held to indicate an intent on the part of the seller to reserve to itself the right of disposing of the salt until the railroad company in Boston in behalf of the seller and in the

Contract (continued).

exercise of the authority conferred by the indorsement on the bill of lading should appropriate and deliver to the customer from the mass the quantity and kind of salt ordered by him. *Rock Glen Salt Co. v. Segal*, 115.

Correspondence between the plaintiff in an action for breach of contract, who was engaged in the business of collecting and selling statistical information relating to motor cars, and the defendant, a manufacturer of motor cars, which was held to show that the plaintiff had released the defendant from an original charge of \$900 upon the defendant's agreeing to pay \$200 a month for service for the coming year, and that the defendant's subsequent failure to carry out the terms of the agreement for future service did not revive this obligation. *Tuttle v. Metz Co.* 272.

In an action to recover the amount which should have been payable to the plaintiff as royalties on the use of a trademark called "Cresco" in the sale of a certain kind of corset, a covenant of the defendant to use its utmost endeavors to manufacture and sell corsets under the plaintiff's trademark was held to be an affirmative and independent agreement for the plaintiff's benefit, for the breach of which he was entitled to recover such a sum of money as would have been due and payable to him had the covenant been kept and performed. *Wright v. Maynard Corset Co.* 343.

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract. *McGovern v. Boston*, 394.

In an action of contract to recover the sum of \$250 according to a certain contract in writing by the defendant, it appeared that the plaintiff agreed orally to do all the things for which the \$250 was to be paid and it was held that a finding was warranted that the oral agreement testified to by the plaintiff made the contract a bilateral one, and that by its terms the defendant promised to pay \$250 forthwith in consideration of the plaintiff's promise and before performance by the plaintiff. *Massachusetts Biographical Society v. Russell*, 524.

Incorporation of Statute.

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract. *McGovern v. Boston*, 394.

Performance and Breach.

In an action by the administrator of a deceased employee against the employer upon a contract to indemnify employees and dependents for injury and death out of a fund established for that purpose, it appeared that the fund was administered and managed by a committee of five persons and that this committee found that the plaintiff was not dependent upon his deceased son, the intestate, and it was held that the judge correctly instructed the jury in substance that, if this committee made no order for payment to the plaintiff because they found in good faith that he was not dependent upon the earnings of the deceased, the plaintiff could not recover. *Clark v. New England Telephone & Telegraph Co.* 1.

Where, in attempted pursuance of a contract of a salt company to sell to a customer "F. O. B. cars" at point of destination, four hundred bags of salt at an agreed price, a railroad corporation as the agent of the salt company tenders to the customer the contents of a car containing not only the four hundred bags called for by the contract but also fifteen barrels of salt that had been bought by another person, the customer has the right under St. 1908, c. 237, § 44, cls. 2, 3, either to accept the part of the salt described in his contract "and reject the rest, or he may reject the whole." *Rock Glen Salt Co. v. Segal*, 115.

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker under a special contract which conduct of the defendant prevented him from performing, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them. *Wheelock v. Zenitas*, 167.

Where, at the trial of an action upon a *quantum meruit* for the value of services as a real estate broker, there was evidence that the plaintiff agreed to secure for the defendant a lease for which he was to receive a certain commission, but not until the premises were rented for as much as or more than the defendant paid for his lease, but that the defendant, by his lack of diligence and failure to aid the plaintiff, prevented the property from making such return, it was held that the plaintiff had a right to go to the jury on the question whether he should recover the value of his services. *Ibid.*

It was pointed out that a claim for unliquidated damages arising from a breach of a contract cannot be reached to be attached or taken on execution in an action at law against the plaintiff by one of his creditors. *Digney v. Blanchard*, 235.

In an action of contract for the price of certain lumber, where the defendant filed an answer in recoupment alleging that the lumber was not delivered within the time required by the contract, an instruction that, if the buyer claimed to have been damaged through delay in delivering or lack of quantity or quality of which he knew or ought to have known and failed within a reasonable time after acceptance to notify the seller that he claimed damages, although particular defects need not be specified, he could not recover, even if he had suffered damage from a breach of the contract, was held to be in conformity with the provisions of the sales act contained in St. 1908, c. 237, as well as with the common law before its passage. *Trimount Lumber Co. v. Murdough*, 254.

In the same case it was said that, the facts not having been in dispute, the question, whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time, not having been raised at the trial, need not be considered by this court. *Ibid.*

Correspondence between the plaintiff in an action for breach of contract, who was engaged in the business of collecting and selling statistical information relating to motor cars, and the defendant, a manufacturer of motor cars, which was held to show that the plaintiff had released the defendant from an original charge of \$900 upon the defendant's agreeing to pay \$200 a month for service for the coming year, and that the defendant's subsequent

Contract (continued).

failure to carry out the terms of the agreement for future service did not revive this obligation. *Tuttle v. Meta Co.* 272.

In the same case it was said, that, the burden being on the plaintiff to prove the contract and the letters by which the contract was made showing the extinction of the charge of \$900 by the agreement to pay \$200 a month in the coming year, there was no ground for saying that the burden was on the defendant to prove a defence of accord and satisfaction. *Ibid.*

It was held that a suit in equity to enforce specific performance by a trustee under a will, who had authority to sell real estate, of an agreement in writing with the plaintiff to sell him real estate belonging to the trust "subject to the approval of the Probate Court for Suffolk County and if license to sell cannot be obtained, the deposit shall be returned and the agreement cancelled," could not be maintained where, after filing a petition for approval of the sale, the trustee amended it to seek approval of a sale for a later and larger offer made by another person, and the court granted the amended petition. *Grennan v. Pierce*, 292.

In the case above described it also was pointed out that the fact that the trustee had authority under the will to make the sale without a license did not affect the validity of the requirement in the contract of the procuring of a license from the Probate Court as a condition precedent to a sale. *Ibid.*

In the same suit it was said that the defendant trustee had committed no breach of contract and that in informing the Probate Court of the higher offer he had performed his plain duty as trustee. *Ibid.*

In an action to recover the amount which should have been payable to the plaintiff as royalties on the use of a trademark called "Cresco" in the sale of a certain kind of corset, a covenant of the defendant to use its utmost endeavors to manufacture and sell corsets under the plaintiff's trademark was held to be an affirmative and independent agreement for the plaintiff's benefit, for the breach of which he was entitled to recover such a sum of money as would have been due and payable to him had the covenant been kept and performed. *Wright v. Maynard Corset Co.* 343.

In the action above described, where it appeared that the "Cresco" corset was a "specialty" corset which was sold on the market by methods not common in the sale of standard corsets, the best methods to employ for its sale were held to be proper subjects for expert testimony, the evidence being helpful, if not necessary, to assist the jury to determine whether the defendant had used its utmost endeavors to manufacture and sell the "Cresco" corset. *Ibid.*

Where, at the trial of an action for breach of a warranty of the quality of a carload of oats sold by the defendant to the plaintiff, to be delivered in a certain city, there is evidence upon which, under suitable instructions, the jury would have been warranted in finding that before the oats reached that city they were in a condition unfit for sale, it would be improper for the judge to order a verdict for the defendant although there was a provision of the contract of sale which required him to examine the oats and to notify the seller of any failure of them to conform to the warranty "not later than the following business day after arrival of the car at destination." *Cavanaugh v. D. W. Ranlet Co.* 366.

In an action for a bonus which was to be paid to the plaintiff if he should succeed in improving a machine of the defendant by a patentable device,

or if he at his option should invent and build a new patentable machine for the same purpose, where it appeared that the plaintiff invented an improvement which was patented more than six years before the date of the writ, and that he also invented an entirely new machine upon which he was at work when the improvement was patented and that the new machine was patented within six years before the date of the writ, it was held that it could not be ruled as matter of law that the plaintiff exercised his option by electing to earn the bonus of \$1,000 on the improvement when it was patented, and that it was for the jury to determine whether the plaintiff had decided upon the invention of the new machine as a fulfilment of his agreement, and that, if he had, his claim was not barred by the statute of limitations. *Hill v. Reece Buttonhole Machine Co.* 544.

Damages to be assessed for breaches of contracts, see appropriate subtitle under DAMAGES.

Waiver of Provision.

Contention, that the requirement of a five days' notice in writing as a condition precedent to the enforcement of a claim for damages in the transportation of a horse had been waived by the station agent of the carrier who was on the platform when the horse arrived, was held to be unfounded because it was not shown that the agent had any authority to waive the requirement. *Fletcher v. New York Central & Hudson River Railroad*, 258.

In the same case it was said that it was not necessary to consider whether the rule, that a carrier has no right to waive a provision in a contract for interstate transportation, which is filed with its tariff schedules, requiring a notice in writing within a certain time, applies to a similar provision in a contract for intrastate transportation, which has been filed in a like manner. *Ibid.*

Rescission.

The mere facts, that a carload of oats was shipped by a bill of lading to the seller's order, that the bill of lading was indorsed by the seller and was attached to a draft upon the purchaser for the amount of the purchase price less the freight, and that the purchaser, without examining the contents of the car, paid the draft and received the carload, were held not as a matter of law to estop the purchaser from rescinding the sale upon discovering that the oats are not of the quality which he agreed to purchase. *Cavanaugh v. D. W. Ranlet Co.* 366.

Question, whether the purchaser waived the warranty, was held to have been one to be determined as a question of fact. *Ibid.*

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which bids for the work to be done in constructing a part of Dorchester tunnel were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract. *McGovern v. Boston*, 394.

If, to procure as low a bid as possible from the contractor, the members of the commission wilfully misled and deceived him as to material facts and concealed the true state of affairs from him, so that he was led to make a contract for a sum too small, the city is not responsible for such misconduct

Contract (*continued*).

on the part of the members of the commission, who are public officers, and such misconduct is no ground for a rescission of the contract. *McGovern v. Boston*, 394.

In Writing.

A letter, "I will personally see to it that your bill is met on the 15th of each month. . . . Yours very truly, G C Co., By H E J," was held as matter of law not to be such a memorandum signed by H E J as would satisfy the requirements of the statute of frauds as a guaranty by him of the account of the corporation, G C Co., and that it could not be found by a jury to have been signed by him. *Arcade Malleable Iron Co. v. Jenks*, 95.

Subsequent letter between the parties was held not to be admissible as completing the memorandum required to satisfy the statute if the defendant in the subsequent letter did not acknowledge the guaranty contained in the first letter as having been made by him. *Ibid.*

Although where the words of a contract in writing are ambiguous the extrinsic circumstances under which it was written may be shown by oral evidence to enable the court to view the words in the same light that the parties did, yet where the extrinsic facts are not in dispute, or after their existence has been shown, the construction of the ambiguous instrument in the light of these circumstances is for the court. *Ibid.*

A custom of tenants of a building in abrogation of a requirement of a lease that an elevator shall not be used for other than freight purposes, not in existence when a lease of one floor was made, has no effect to contradict the clear and unambiguous covenant of the lease. *Follins v. Dill*, 321.

In an action for a bonus agreed to be paid to the plaintiff upon his inventing a patentable improvement to a machine of the defendant, or, at his option, a new machine for the same purpose, it appeared that the contract sued upon was an oral one, although a condensed written statement of it, which did not embody the whole of the contract between the parties, was prepared for record in the Patent Office, and it was held that this written statement was not a contract in writing which precluded the plaintiff from recovering on the oral agreement. *Hill v. Reece Buttonhole Machine Co.* 544.

Implied.

In an action of contract for money had and received to recover the amount of a sum of money entrusted to the defendant to put into a "voting contest" on the ground that the plaintiff was induced to part with the money by misrepresentations made to him by the defendant, if it appears that the alleged misrepresentations did not relate to facts but to conjectures as to future events and would not give a cause of action in tort for deceit, the plaintiff cannot recover. *Brown v. C. A. Pierce & Co. Inc.* 44.

Where the facts are not such as to bring the case within the provision of St. 1910, c. 576, no action can be maintained against a husband and wife jointly upon a promise implied in law to pay for necessary board furnished to them, the promise which the law implies in such a case being a promise on the part of the husband alone to pay for such necessities. *Lavoie v. Dube*, 87.

In the case deciding the point stated above, the question, whether the plaintiff on the facts of that case could recover against the defendant husband alone, was not before the court. *Ibid.*

In an action to recover the price of hats and veils furnished to infant daughters of the defendant to wear at the funeral of their mother, if it appears "that the defendant neither expressly nor impliedly authorized the purchase of the goods," but it appears that he permitted his minor daughters to use the articles, which were purchased by them from the plaintiff with his knowledge, and that he afterwards offered to pay a certain price for the articles, which his daughters asserted was the agreed price, it can be found that he adopted and ratified the purchase. *Bisbee v. McManus*, 124.

In the same case it appeared that the defendant was a workman earning \$18 a week, and it was held that it could not be ruled as matter of law that the four hats and two veils furnished to the defendant's four minor daughters for the total price of \$14 to wear at their mother's funeral were not in the class of necessities. *Ibid*.

Where, at the trial of an action upon a *quantum meruit* for the value of services as a real estate broker, there was evidence that the plaintiff agreed to secure for the defendant a lease for which he was to receive a certain commission, but not until the premises were rented for as much as or more than the defendant paid for his lease, but that the defendant, by his lack of diligence and failure to aid the plaintiff, prevented the property from making such return, it was held that the plaintiff had a right to go to the jury on the question whether he should recover the value of his services. *Wheelock v. Zenitas*, 167.

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker under a special contract which conduct of the defendant prevented him from performing, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them. *Ibid*.

In an action to recover \$275 paid by the plaintiff to the defendant for the chassis of a motor car that had been injured by fire, where there was evidence that the plaintiff had paid the price agreed upon and as between the parties had acquired title to the chassis but that the defendant refused to deliver it or to give a good title to it, it was held that the plaintiff was entitled to go to the jury. *Weld v. Stiles*, 179.

Since St. 1911, c. 741, § 17, requires that a contract for work in the construction of the Dorchester tunnel, which involves \$2,000 or more in amount, shall be in writing and signed by a majority of the Boston transit commission, a contractor cannot recover from the city upon a *quantum meruit* for a sum in excess of \$2,000 where he contends that a contract in writing for such work was invalid. *McGovern v. Boston*, 394.

Although St. 1911, c. 741, § 17, does not expressly prohibit recovery from the city upon an implied contract under the circumstances above described, it is the only reasonable inference from its provision that all contracts coming within its terms must be in writing. *Ibid*.

Building Contract.

Where, in a declaration in set-off in an action on a building contract, the defendant under an express provision of the contract seeks to recover \$50 for every week that the work remained unfinished after the dates specified for

Contract (*continued*).

completion, attempting to enforce this provision as one for liquidated damages, he cannot introduce evidence to show the amount of loss occasioned to him by the delay, being confined to the measure of damages for delay which by the terms of the contract he had agreed upon in advance. *Millen v. Gulesian*, 27.

In the present case the exclusion of this evidence on the question of damages was rendered immaterial by a finding of the jury that the plaintiff was not liable on the defendant's declaration in set-off. *Ibid*.

CONVERSION.

In an action for alleged conversion of earrings given by the plaintiff to the defendant as a gratuitous bailee, where there was evidence that the plaintiff demanded of the defendant the return of the earrings and that the defendant then said that, if the plaintiff would refrain for a short time from bringing an action against the defendant for the loss of the earrings, he would pay the plaintiff for them a sum of money named, that the plaintiff did so refrain for such time but that the defendant did not pay to the plaintiff the sum named nor return both or either of the earrings, it was held that there was no evidence of a conversion of both earrings by the defendant. *Rubin v. Huhn*, 126.

Evidence in the action above described, that the defendant, being in possession of the remaining earring, refused upon the plaintiff's demand to deliver it to the plaintiff, and that the defendant delivered this remaining earring to a person not authorized to receive it, was held to warrant a finding that there was a conversion by the defendant of the remaining earring. *Ibid*.

In the same case it was held that, as the defendant properly could be held liable for the value of one earring at the time of its conversion, the trial judge was right in refusing to rule "that upon all the evidence judgment must be directed for the defendant." *Ibid*.

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York but whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

CORPORATION.

By-laws.

In an action against a corporation upon a contract of employment of the plaintiff by a director of the defendant who, without a formal vote, had

been given implied authority to make the contract by the other directors, who also constituted all the stockholders and officers of the corporation, it was held that it was no defence for the corporation that a by-law, unknown to the plaintiff, required by its terms that the manager and the other employees should be appointed by the board of directors and that no vote or meeting of the directors ever had authorized the employment of the plaintiff. *Hartford v. Massachusetts Bowling Alleys, Inc.* 30.

Officers and Agents.

Acts of three persons, who owned all the capital stock and held all the offices of a corporation and together constituted its board of directors, which, without their having passed any vote on the subject, were held to justify a finding that they had constituted the director who was treasurer the managing director of the corporation with implied authority to hire a manager of the bowling alleys to serve for one year for \$30 a week and five per cent of the net profits, so that such manager of the alleys, upon his discharge without cause, might maintain an action against the corporation for its breach of contract. *Hartford v. Massachusetts Bowling Alleys, Inc.* 30.

In such action it is no defence for the corporation that a by-law, unknown to the plaintiff, required by its terms that the manager and the other employees should be appointed by the board of directors and that no vote or meeting of the directors ever had authorized the employment of the plaintiff. *Ibid.*

Declarations and conduct of the officers of the college corporation and of the grantor in a certain trust deed for the benefit of the corporation made after the delivery of the deed and before the death of the grantor were considered in determining what was the meaning of the provisions of the deed which upon their face were doubtful. *Amory v. Amherst College*, 374.

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, it appeared that the authority of the treasurer of the corporation was limited, and it was held that he had no authority to bind the corporation by his letters, accounts, statements or bookkeeping entries, so that evidence of that character should not have been admitted. *Ibid.*

Officers of a trust company, which was named as executor of the will of a woman and which previously had been trustee of her property amounting substantially to \$100,000 which it was bound "to transfer, convey and pay over . . . to her executors or administrators" were held not to be disqualified as attesting witnesses to her will. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

Fund for Injured Employees and Dependents.

Under R. L. c. 173, §§ 48, 121, a finding by a trial judge, that an action on a contract made by a corporation to indemnify its employees or their dependents out of a benefit fund for injuries sustained in the course of their employment or for death caused thereby was for the cause of action for which an action of tort against the same corporation for causing the alleged suffering and death of an employee by reason of the defendant's negligence was intended to be brought and was the cause of action relied on by the plaintiff

Corporation (*continued*).

when the action of tort was commenced, was held not as matter of law to have been impossible. *Clark v. New England Telephone & Telegraph Co.* 1. It therefore was held that the allowance by the trial judge of an amendment from such an action of tort into such an action of contract was not unwarranted. *Ibid.*

In the same action it was held that it was no defence that the plaintiff brought an action of tort against another corporation for the injuries and death of the plaintiff's intestate in which he discharged and released the defendant, and that consequently it was right for the trial judge to deny a motion of the defendant to be allowed to amend its answer by setting up such an alleged defence. *Ibid.*

In the action above described it appeared that the fund was administered and managed by a committee of five persons and that this committee found that the plaintiff was not dependent upon his deceased son, the intestate, and it was held that the judge correctly instructed the jury in substance that, if this committee made no order for payment to the plaintiff because they found in good faith that he was not dependent upon the earnings of the deceased, the plaintiff could not recover. *Ibid.*

Under the circumstances, the complete reliance of the committee on a report of facts made by an investigator was held not to have been evidence of bad faith, there being nothing to indicate that they had any reason to distrust the investigator's faithfulness, accuracy or soundness of judgment. *Ibid.*

Taxation of Foreign Corporation.

When a foreign corporation comes into this Commonwealth to transact a local or intrastate business, it assents to be bound by our laws respecting such corporations, including the laws relating to taxation so far as they are valid. *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.* 494.

Foreign corporation which had a contract to furnish a city in this Commonwealth with fire alarm lamps and with "boulevard lanterns, burners, domes and incandescent mantles" for the lighting of public streets, parks and other public places, was held under the circumstances of its ownership of certain personal property to be liable to taxation therein under St. 1909, c. 516, § 2, and St. 1909, c. 490, Part I, § 23, cl. 1. *Ibid.*

There is nothing in the statutes that authorize the collection of such a tax from a foreign corporation which violates any provision of the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

Social Club.

Elements proper for consideration in an action by one who had been a member of a social club against the members of the governing committee of the club for the alleged unlawful expulsion of the plaintiff as a member. *Richards v. Morison*, 458.

Where the constitution of a social club gives the governing committee jurisdiction over the expulsion of members in a manner there prescribed for "conduct injurious to the good order, peace, or interest of the association," the making of a false charge of misappropriation of property of the club by a member of the club who is a member of the governing committee can be

found by the governing committee to be a sufficient ground for expulsion. *Richards v. Morison*, 458.

Evidence in such an action which was held not to show malice or bad faith on the part of the defendants. *Ibid.*

In the case above referred to it was said by this court that a careful examination of the whole evidence showed that it did not justify the inference that the defendants did not keep within the limits of their jurisdiction as defined by the constitution of the club or that they did not act in good faith or that they were controlled by malice. *Ibid.*

CUSTOM.

In an action against a railroad corporation for personal injuries received when the plaintiff was run into by a train as he was crossing the tracks at a station to enter the train from the side of the tracks farthest from the station, it was said that the evidence of the use by persons of the outer space in getting upon trains on the farther track merely tended to show that the defendant had tolerated such a practice without taking measures to prevent it, and did not tend to show an invitation from the defendant to use that space. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

A custom of tenants of a building in abrogation of a requirement of a lease that an elevator shall not be used for other than freight purposes, not in existence when a lease of one floor was made, has no effect to contradict the clear and unambiguous covenant of the lease. *Follins v. Dill*, 321.

DAMAGES.

For Property taken or damaged under Statutory Authority.

Under St. 1899, c. 448, § 16, providing that the Boston, Cape Cod and New York Canal Company should pay damages "In case of any injury to any fishery, including oyster fisheries, caused by said canal company by the deposit of excavated material, or in any other way, . . . to the owner or licensee of said fishery," such owner or licensee is entitled to damages, wherever his fishery which was injured was located, within or without the location of the canal, and whether the injury suffered was to oysters in the soil and the seed attached thereto or resulted in the permanent destruction of the fishery. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

The owner or licensee of an oyster fishery injured by the Boston, Cape Cod and New York Canal Company in the construction of its canal can recover damages for oyster seed or oysters placed in the ground at a time subsequent to the date of the filing of the company's location in the registry of deeds for Barnstable County. *Ibid.*

The damages for such injury should be determined as of the date when the injury is done. In this case the injury was two years and one month after the date of the filing of the company's location. *Ibid.*

If the objection, that the grant of a license by the selectmen of a town for the planting, growing and digging of oysters, had become forfeited under R. L. c. 91, §§ 107, 110, because it had been assigned without the consent in writing of the selectmen, has not been raised and enforced by the Commonwealth, it cannot successfully be raised by the Boston, Cape Cod and New

Damages (continued).

York Canal Company in a proceeding under St. 1899, c. 448, § 16, for the assessment of damages resulting to such a fishery by acts of the canal company in the construction of its canal. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

For Breach of Contract.

It was pointed out that a claim for unliquidated damages arising from a breach of a contract cannot be reached to be attached or taken on execution in an action at law against the plaintiff by one of his creditors. *Digney v. Blanchard*, 235.

In Tort.

Special damages in an action for slander. *Craig v. Proctor*, 339.

In an action of tort where a verdict for the plaintiff would not have been warranted, the exclusion of evidence relating to damages was immaterial. *De Wolfe v. Roberts*, 410.

Liquidated.

Where, in a declaration in set-off in an action on a building contract, the defendant under an express provision of the contract seeks to recover \$50 for every week that the work remained unfinished after the dates specified for completion, attempting to enforce this provision as one for liquidated damages, he cannot introduce evidence to show the amount of loss occasioned to him by the delay, being confined to the measure of damages for delay which by the terms of the contract he had agreed upon in advance. *Millen v. Gulesian*, 27.

In the present case the exclusion of this evidence on the question of damages was rendered immaterial by a finding of the jury that the plaintiff was not liable on the defendant's declaration in set-off. *Ibid.*

Recoupment.

In an action of contract for the price of certain lumber, where the defendant filed an answer in recoupment alleging that the lumber was not delivered within the time required by the contract, an instruction that, if the buyer claimed to have been damaged through delay in delivering or lack of quantity or quality of which he knew or ought to have known and failed within a reasonable time after acceptance to notify the seller that he claimed damages, although particular defects need not be specified, he could not recover, even if he had suffered damage from a breach of the contract, was held to be in conformity with the provisions of the sales act contained in St. 1908, c. 237, as well as with the common law before its passage. *Trimount Lumber Co. v. Murdough*, 254.

In the case above described, it also was held that the verdict of the jury for the plaintiff in the full amount claimed was a conclusive finding that the defendant was entitled to no damages in recoupment because he had failed to give notice of his claim within a reasonable time, and therefore exceptions of the defendant to the exclusion of the evidence which he contended was admissible to show the amount of the damages suffered by him became immaterial. *Ibid.*

DEATH.

Release executed by one, who had suffered an injury by reason of the negligence of a street railway corporation, was held, in case of the subsequent death of the injured person, not to bar an action brought by the executor of his will under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, c. 392, § 1; 1911, c. 635; 1912, c. 354, to enforce the penalty for causing his death by the negligent act that caused the injury specified in the release. *Wall v. Massachusetts Northeastern Street Railway*, 506.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death*.

DECEIT.

An assurance, that by putting \$330 into a "voting contest" the person to whom the statement is addressed will "win the automobile and also the grafonola that was put up as a special prize," is not a statement by words or conduct of present or past material facts, but is a mere promise or conjecture as to future events and, if the prophecy is proved to have been a false one made with the intention to deceive and to have been relied upon, this does not give a right of action in tort for deceit. *Brown v. C. A. Pierce & Co. Inc.* 44.

Deceit of members of the Boston Transit commission in procuring a low bid for the construction of a part of the Dorchester tunnel was held not to make the city liable. *McGovern v. Boston*, 394.

A statement in an editorial published in a newspaper, that the owner of the paper for years had guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default. *Heathcote v. Curtis Publishing Co.* 569.

DEED.

Construction.

A grant of an easement in land cannot be created by implication from the words of a deed or indenture or from the conjectured wishes of the parties where the easement is not conveyed by words of grant and inheritance. *Apsey v. Nash*, 77.

A deed conveying property to a trustee to pay the income to the settlor during his life and upon his death leaving no issue "to distribute said trust fund among those who would take his real and personal property if he had then died intestate," was held not to give to a bankrupt brother a vested interest in the trust fund before the persons who were to take that fund were determined upon the death of the settlor, so that, after the death of the settlor, the trustee in bankruptcy of the brother, who was his next of kin and had been declared a bankrupt before the settlor's death, had no claim upon the fund. *Hall v. Farmer*, 103.

Deed (*continued*).

It was held that a deed of certain real estate created two distinct trusts, one for the benefit of a college and the other for the benefit of the grantor and certain of his descendants; that the first trust remained valid although the second was invalid, and that, because of the invalidity of the second trust, the beneficial interest therein resulted to the grantor. *Amory v. Amherst College*, 374.

Upon a reading of the entire deed creating the above described trust, it was held that it was the intention of the grantor to convey the real estate to the college corporation in fee simple in trust, and not to create an estate upon a condition subsequent. *Ibid*.

Conditions subsequent are not favored in the law, and a deed will not be construed to create an estate on condition unless the language used necessarily imports a condition or the intent of the grantor to create an estate on condition is indicated clearly and unequivocally. *Ibid*.

Declarations and conduct of the officers of the college corporation and of the grantor in the deed above described made after the delivery of the deed and before the death of the grantor were considered in determining what was the meaning of the provisions of the deed which upon their face were doubtful. *Ibid*.

In further construction of the deed above described, it was held that it plainly appeared that the parties did not intend that a mere use should be created to be executed under the statute, but that the college corporation should take an estate in fee in trust imposing active, diligent and continuing duties upon the trustee. *Ibid*.

Unrecorded.

Upon the issue, on a petition for the registration of the title to land, whether an attaching creditor under whom the plaintiff claimed title had before his attachment of the land actual knowledge of the existence of an unrecorded deed under which the defendant claims title, it was held that the burden of proof is on the respondent to establish this affirmative defence. *Hughes v. Williams*, 467.

DEVISE AND LEGACY.

Identity of Legatee.

Upon construction of the whole of a will which provided that a trust fund, upon the death of the testator's last surviving child, should be conveyed and delivered "to all my then surviving grandchildren and their issue," it was held that the clause quoted should be construed as if it read, "to all my then surviving grandchildren and [in case of their death to] their issue." *Manning v. Manning*, 527.

To Individuals or to a Class.

Unless it is clear that a testator intended that the persons named in his will as the legatees of a fund should take the fund as a gift to them and the survivors of them as a class, a gift by will of a sum of money to be distributed equally among certain legatees described by name is a separate gift to each of the legatees named, and if one of them dies before the testator, leaving no issue, the legacy to such legatee lapses and, if there is a residuary clause in the will, falls into the residue of the testator's estate. *Boston Safe Deposit & Trust Co. v. Reed*, 267.

A gift of "stocks and bonds to the amount of one hundred thousand dollars, to be equally divided between them" to cousins of the testator, was held to make separate gifts to each, so that, when one died, the legacy to him of stocks and bonds to the amount of \$25,000 lapsed and that amount fell into the residue of the testator's estate, leaving stocks and bonds to the amount of \$75,000 to be distributed among the other legatees designated in the provision quoted above. *Boston Safe Deposit & Trust Co. v. Reed*, 267.

Whether Specific or General.

Where it appeared that a testator at the time of his death owned stocks and bonds in excess of \$100,000 in value, a provision in his will giving a legacy of "stocks and bonds to the amount of one hundred thousand dollars" to certain individuals, to be equally divided among them, was a general and not a specific bequest and that the legatees were entitled to receive stocks and bonds equal to the amounts of their respective legacies at the fair market value of the securities at the time of their transfer. *Boston Safe Deposit & Trust Co. v. Reed*, 267.

Non-transferable Life Interest.

Under the provisions of a will giving to two nieces of the testatrix a life interest in a homestead, it was held that one to whom one of the nieces, who had ceased to occupy the property, had conveyed her interest could not maintain a petition for partition against the other niece, who continued to live in the homestead, because the right to use the house was not transferable, it having been the intention of the testatrix that the possession of the house should not be interfered with as long as either of her nieces wished to use it. *Towle v. Wingate*, 566.

DISBARMENT.

See appropriate subtitle under ATTORNEY AT LAW.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOG.

On the evidence at the trial of an action under R. L. c. 102, § 146, by a boy against a husband and wife to recover double damages for having been bitten by a dog alleged to have been kept by the defendants jointly or by one of them individually, it was held that a finding was not warranted that the defendants jointly were the keepers of the dog or that the defendant wife was its keeper, but that a finding was warranted that the defendant husband was the keeper of the dog. *McIntire v. Leland*, 348.

In the same case it was said that the mere fact of ownership by the wife of the farm on which the dog was kept by the husband was not sufficient to raise an inference of the joint keeping of the dog by the husband and wife and thereby to overcome the presumption of the exercise of dominant authority by the husband and of compliance by the wife. *Ibid.*

DOMICIL.

A domicile is not lost until another is acquired. *White v. Stowell*, 594.

Accordingly, a man having a domicile in a city in this Commonwealth moves to another city in an attempt to find employment there and looking for a place to establish himself where he can support his family, without any fixed intention of making the city to which he has moved his home unless he shall succeed in obtaining such an occupation there, until he has succeeded in obtaining such an occupation in the city to which he has moved his absence from his domicile in this Commonwealth is temporary and his domicile here has not been abandoned. *Ibid.*

DRAIN.

Where one of a number of landowners who had the right to use in common a private drain continued to use it for many years after all the others having the right had made connections with a public sewer and had ceased to use the private drain, this does not make the person who continues to exercise his right to use the drain liable for damage to property from an overflow of waste water from the drain, which was due wholly to the act of a third person who built a foundation wall across the drain and which was not due to any negligence on the part of the person who continued to use the drain. *Pearl v. Whitcomb*, 181.

Order of a board of health directing a landowner, who had been using a private drain, to connect with a public sewer, was held not to require him to cease to use the private drain in the absence of an express prohibition to that effect. *Ibid.*

EASEMENT.

A grant of an easement in land cannot be created by implication from the words of a deed or indenture or from the conjectured wishes of the party where the easement is not conveyed by words of grant and inheritance. *Apey v. Nash*, 77.

Suit to enjoin infringement of an easement, see appropriate subtitle under EQUITY JURISDICTION.

ELECTION.

Election by a plaintiff to pursue a right to which he was not entitled was said not to bar him from exercising another right, inconsistent with the first, to which he was entitled. *Cinamon v. St. Louis Rubber Co.* 33.

In an action by an employee of a firm of masons against the members of a firm of teamsters for personal injuries alleged to have been sustained by reason of the negligence of a driver of the defendants, it was held that certain evidence as to treatment of the plaintiff at a hospital which his employer had selected under the workmen's compensation act for treatment of its employees would not warrant a finding that the plaintiff had elected to accept the benefits of the workmen's compensation act. *Wahlberg v. Bowen*, 335.

In an action for a bonus which was to be paid to the plaintiff if he should succeed in improving a machine of the defendant by a patentable device,

or if he at his option should invent and build a new patentable machine for the same purpose, where it appeared that the plaintiff invented an improvement which was patented more than six years before the date of the writ, and that he also invented an entirely new machine upon which he was at work when the improvement was patented and which was patented within six years before the date of the writ, it was held that it could not be ruled as matter of law that the plaintiff exercised his option by electing to earn the bonus of \$1,000 on the improvement when it was patented, and that it was for the jury to determine whether the plaintiff had decided upon the invention of the new machine as a fulfilment of his agreement, and that, if he had, his claim was not barred by the statute of limitations. *Hill v. Reece Buttonhole Machine Co.* 544.

Where services are rendered and money is paid for a person who afterwards turns out to have been the agent for an undisclosed principal, an action for the services and money brought against the agent, in which judgment is entered and execution issued while the plaintiff still is ignorant of the existence of the principal, if the judgment is wholly unsatisfied, is not an exercise of the plaintiff's right of election to hold the agent, and, therefore, is no bar to an action for the same services and money brought against the principal when he has become known. *Gavin v. Durden Coleman Lumber Co.* 576.

Election between counts of a declaration, see appropriate subtitle under PRACTICE, CIVIL.

ELECTIONS.

In the provision of the election laws contained in St. 1913, c. 835, § 292, as amended by St. 1914, c. 435, the requirement that the cross shall be marked "in the square" is merely directory and not mandatory, and a vote for a candidate may be counted where the cross was marked by the voter against the name of the candidate between that name and the square, if the intention of the voter to vote for the candidate is manifest. *Beauchemin v. Flagg*, 23.

ELECTRICITY.

It has become a matter of common knowledge that physical harm is likely to follow contact with a wire charged with an electric current and also that copper wires are used for the transmission of such a current. *Chartier v. Barre Wool Combing Co. Ltd.* 153.

Liability for negligence in the use of electricity, see appropriate subtitle under NEGLIGENCE.

ELEVATOR.

Requirement of a covenant in a lease of the third floor of a building, that an elevator should be used for freight purposes only, was held not to have been waived by reason of permission given by the janitor, where there was no evidence that the janitor had any authority to modify the provisions of the lease and no evidence that the defendant had any knowledge of the violation of the covenant. *Follins v. Dill*, 321.

A custom of tenants of a building, in abrogation of a requirement of a lease that an elevator shall not be used for other than freight purposes, not in

Elevator (*continued*).

existence when a lease of one floor was made, has no effect to contradict the clear and unambiguous covenant of the lease. *Follins v. Dill*, 321.
Actions for personal injuries resulting from negligence in the maintenance of elevators, see appropriate subtitle under NEGLIGENCE.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.

See also WORKMEN'S COMPENSATION ACT.

EQUITY JURISDICTION.

Laches.

Evidence in a suit to enforce a resulting trust was held to show that the suit was barred by laches. *Amory v. Amherst College*, 374.

Statute of Limitations.

Upon the evidence before a master to whom was referred a bill in equity to enforce a resulting trust in land which had been conveyed to a trustee upon trusts, part of which were invalid, and upon certain facts found by the master, it was held that the trustee to the knowledge of the beneficiary had repudiated the rights of the beneficiary about thirty-nine years before the beginning of the suit and had remained steadfast in that position, and therefore that the suit could not be maintained. *Amory v. Amherst College*, 374.

Bill for Instructions.

This court refused to instruct executors of a will as to what succession tax they should pay upon the happening of events to occur in the future. *Milton v. Treasurer & Receiver General*, 140.

Specific Performance of Contract.

It was held that a suit in equity to enforce specific performance by a trustee under a will, who had authority to sell real estate, of an agreement in writing with the plaintiff to sell him real estate belonging to the trust "subject to the approval of the Probate Court for Suffolk County and if license to sell cannot be obtained, the deposit shall be returned and the agreement cancelled" could not be maintained where, after filing a petition for approval of the sale, the trustee amended it to seek approval of a sale for a later and larger offer made by another person, and the court granted the amended petition. *Grennan v. Pierce*, 292.

In a suit in equity to enforce the specific performance of an agreement to re-convey and reassign to the plaintiff licenses under certain patents, a decree dismissing the bill because the judge refused to order performance of the agreement without protecting a third party, who in good faith had advanced \$25,000 upon the security of the licenses in question and who was not a party to the suit, was held to be right under the circumstances. *Feaster v. Feaster Film Feed Co.* 550.

Rescission of Contract.

In a suit in equity by the members of a firm of shoe dealers against the administrators *de bonis non* of the estate of a testator, the executors of whose will had continued his business and had purchased merchandise of the plaintiffs as executors, to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*, it appearing that the goods might have been identified and separated, but that they were not and that afterwards all the goods in the store had been sold for a single price, it was held that it was too late for the plaintiffs to rescind their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds. *Donnelly v. Alden*, 109.

A bill in equity by a contractor against the city of Boston which alleges that a contract made by him with the city through the Boston transit commission for the construction of a section of the Dorchester tunnel was procured through negligence of the commission in not accurately ascertaining and stating to him the character of the work to be done and through wilful deception and fraud of the commission in misstating the facts, and which seeks a rescission of the contract, cannot be maintained as a bill for a cancellation of the contract by reason of a mutual mistake. *McGovern v. Boston*, 394.

Mistake.

A bill in equity by a contractor against the city of Boston which alleges that a contract made by him with the city through the Boston transit commission for the construction of a section of the Dorchester tunnel was procured through negligence of the commission in not accurately ascertaining and stating to him the character of the work to be done and through wilful deception and fraud of the commission in misstating the facts, and which seeks a rescission of the contract, cannot be maintained as a bill for a cancellation of the contract by reason of a mutual mistake. *McGovern v. Boston*, 394.

Whether under the circumstances a bill in equity to cancel the contract because of a mutual mistake of the contractor and the commission would lie, was not considered. *Ibid*.

To set aside Judgment.

It is no ground for maintaining a suit in equity to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, that the promissory notes on which the judgment was obtained were executed on Sunday and that the plaintiff had an absolute defence to the action. *Joyce v. Thompson*, 106.

A demurrer to a bill in equity seeking to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, where the bill contains an allegation that the notes on which the judgment was obtained were executed on Sunday, does not admit that the judgment is tainted with illegality and therefore void. *Ibid*.

Suit by Creditors of Donee of Power.

Equity will enforce the equitable duty of a donee of a power to exercise the power for the purpose of paying his debts before he gives away the property to other persons. *Shattuck v. Burrage*, 448.

Further funds, collected by an administrator *de bonis non* with the will annexed of the estate of a testator upon an item entered in his inventory as a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will, were held not to be new assets within the meaning of R. L. c. 141, §§ 11, 18. *Shattuck v. Burrage*, 448.

Suit under R. L. c. 141, §§ 11, 18.

Further funds, collected by an administrator *de bonis non* with the will annexed of the estate of a testator upon an item entered in his inventory as a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will, were held not to be new assets within the meaning of R. L. c. 141, §§ 11, 18. *Shattuck v. Burrage*, 448.

In the same case it was said that it was unnecessary to determine in that case whether the words "new assets" as used in the statute included such equitable assets as a fund appointed by a debtor testator to persons other than his creditors by the exercise of a power of testamentary appointment. *Ibid.*

To reach and apply Property not attachable at Law.

A claim, arising from a decree, which was made in a suit in equity brought by trustees of a building trust and a receiver of the property of the trust appointed by a court of equity against a former trustee of the trust and which directed the defendant to pay to the plaintiffs a certain amount of money that represented losses sustained by the trust through breaches of trust by the defendant, is a "debt" within R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2. *Digney v. Blanchard*, 235.

A right of such a debtor to damages, arising from a breach of a contract by a bank to lend to him a certain amount of money upon his note secured by a mortgage upon certain land when he should secure title to the land, is a property right within the provisions of the above statute, although an action is pending by the debtor against the bank for the enforcement of the right and the damages are unliquidated. *Ibid.*

It is immaterial to the maintenance of such a suit that the value of the claim of the debtor which the plaintiff seeks to reach and apply to the payment of his debt is uncertain, since it is of a nature that can be ascertained "by sale, appraisal or by . . . means within the ordinary procedure of the courts." *Ibid.*

Where, in such a suit, the bill alleges facts which, if proved, will establish such breach of contract and the defendant demurs, the truth of the facts so alleged are admitted by the demurrer and it is not open to the defendant to contend that the defendant in the action at law by the debtor contests liability and that his liability is not established. *Ibid.*

To recover Money wrongly paid by Executor.

It was held that a suit in equity could not be maintained by the administrator *de bonis non* of the estate of a testator, the executors of whose will

had continued his business and had purchased shoes of certain dealers, against the dealers to compel them to repay the amount of money paid to them by the executors, where it did not appear that the business was conducted by the executors at a loss. *Donnelly v. Alden*, 109.

To set aside Mortgage.

In a suit in equity, by certain minors entitled to the remainders under a trust created by a will, to set aside a mortgage made by the former executors of the will, acting as trustees, to the defendants to secure the payment of indebtedness of the executors to the defendants for shoes sold to the executors while they were carrying on the retail shoe business of the testator after his death in the name of his estate, it was held that the mortgage must be set aside. *Donnelly v. Alden*, 109.

In the suit above described, it also was held that the defendants, knowing of the death of the testator, ought to have inspected the probate records, which would have shown them that the executors had no authority to conduct the business and would have led to the further discovery that the persons interested in the remainder were minors, and that a finding of the trial judge as to the actual state of mind of the defendants was immaterial. *Ibid.*

To restrain Violation of Covenant in Sublease.

In a suit in equity by the assignee of the rights of the sublessor under a sublease in writing to the defendant of a store on the ground floor of a building which was leased to such sublessor by its owner, to enjoin the defendant from violating a covenant of the sublease by cutting an opening in the partition wall between the leased store and an adjoining store in the next building, where it appeared that the owner had given the defendant permission in writing to cut an opening in the partition wall for the purpose of connecting the two stores, it was held that the owner of the building had no power to authorize the defendant to violate the obligations of his covenant in the sublease from the plaintiff's assignor, and that the plaintiff was entitled to an injunction. *Essex Lunch, Inc. v. Boston Lunch Co.* 557.

To enjoin Infringement of Easement.

Acts of the superintendent of streets of a town, which, as the owner of certain land owned as appurtenant to it an easement of the right to use a private way fifty feet wide and had brought a suit in equity for a mandatory injunction to compel the removal of a substantial brick wall built nineteen feet into such private way, and of a member of the board of selectmen having in charge the highway district that includes the right of way, which were held to be no defence because these acts did not constitute a license by the town to interfere with the easement owned by it, which could not be relinquished nor extinguished by an act of any town officer not authorized by the town. *Brookline v. Whidden*, 485.

In the same cases it was held that the defendants under the circumstances must be taken to have made expenditures without excuse and under no misapprehension; and that, there being no suggestion that prompt action had not been taken when the matter came to the attention of the proper

Equity Jurisdiction (*continued*).

officers of the town, mandatory injunctions should issue ordering the defendants to remove the obstructions. *Brookline v. Whidden*, 485.

To enjoin Criminal Prosecution.

A suit in equity cannot be maintained by one engaged in business to enjoin the chief of police of a city from committing an alleged apprehended unlawful interference with the plaintiff's business by instituting a complaint against the plaintiff for an alleged violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1, in regard to hawkers and pedlers, by exhibiting samples of goods in a room hired in a hotel in that city without first obtaining a license. *Shuman v. Gilbert*, 225.

The fact that a person engaged in business may be injured in respect to his business by prosecution for an alleged crime, in conducting his business in an unlawful manner, is not a sufficient ground for a suit in equity by that person asking the court to ascertain in advance whether the business as conducted by him is in violation of a penal statute. *Ibid*.

In the case in which the points above stated were decided, it was said that whether the plaintiffs, or any of them, were guilty of any infraction of the criminal law was a question to be tried in a criminal court and not in this suit in equity. *Ibid*.

Mandatory Injunction.

In a suit to enjoin infringement of an easement and to compel the removal of a brick wall, it was held that the defendants under the circumstances must be taken to have made expenditures without excuse and under no misapprehension; and that, there being no suggestion that prompt action had not been taken when the matter came to the attention of the proper officers of the town, mandatory injunctions should issue ordering the defendants to remove the obstructions. *Brookline v. Whidden*, 485.

To enforce Constructive Trust.

See TRUST, *Constructive*.

To establish Resulting Trust.

See appropriate subtitle under TRUST.

To enforce Oral Trust.

See appropriate subtitle under TRUST.

To enjoin Unlawful Interference.

See UNLAWFUL INTERFERENCE.

EQUITY PLEADING AND PRACTICE.

Parties.

In a suit in equity by six plaintiffs, each engaged in a different business, to enjoin an alleged anticipated unlawful interference with their business, the

defendant demurred, assigning various causes of demurrer but not assigning as a cause of demurrer the improper joinder of the plaintiffs in a single suit, and the question of misjoinder of the plaintiffs was treated by this court as not open upon the demurrer. *Shuman v. Gilbert*, 225.

In a suit in equity to enforce the specific performance of an agreement to reconvey and reassign to the plaintiff licenses under certain patents, a decree dismissing the bill because the judge refused to order performance of the agreement without protecting a third party who, in good faith had advanced \$25,000 upon the security of the licenses in question and who was not a party to the suit, was held to be right under the circumstances. *Feaster v. Feaster Film Feed Co.* 550.

Bill.

A bill in equity by a contractor against the city of Boston which alleges that a contract made by him with the city through the Boston transit commission for the construction of a section of the Dorchester tunnel was procured through negligence of the commission in not accurately ascertaining and stating to him the character of the work to be done and through wilful deception and fraud of the commission in misstating the facts, and which seeks a rescission of the contract, cannot be maintained as a bill for a cancellation of the contract by reason of a mutual mistake. *McGovern v. Boston*, 394.

Demurrer.

A demurrer to a bill in equity seeking to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, where the bill contains an allegation that the notes on which the judgment was obtained were executed on Sunday, does not admit that the judgment is tainted with illegality and therefore void. *Joyce v. Thompson*, 106.

In a suit in equity by six plaintiffs, each engaged in a different business, to enjoin an alleged anticipated unlawful interference with their business, the defendant demurred, assigning various causes of demurrer but not assigning as a cause of demurrer the improper joinder of the plaintiffs in a single suit, and the question of misjoinder of the plaintiffs was treated by this court as not open upon the demurrer. *Shuman v. Gilbert*, 225.

Where, in a suit in equity, under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, to reach and apply, in payment of a debt, a claim of the debtor to damages for a breach of a contract, which the debtor is seeking to enforce by an action at law, the bill alleges facts which, if proved, will establish such breach of contract and the defendant demurs, the truth of the facts so alleged are admitted by the demurrer and it is not open to the defendant to contend that the defendant in the action at law by the debtor contests liability and that his liability is not established. *Digney v. Blanchard*, 235.

Master.

Objections and exceptions to report.

In a suit in equity certain exceptions to a master's report were founded on the alleged erroneous admission of evidence by the master, but it appeared

by the report that the master reached his conclusions apart from this evidence, and it was held that the exceptions were immaterial and need not be considered. *Bradford v. Eastman*, 499.

Findings of fact.

In a suit in equity that was referred to a master, where the evidence is not reported, the findings of the master must stand if the facts set out in the record are sufficient to justify directly or by implication all the conclusions reached by him. *Jenanyan v. Fisher*, 472.

Rules of Court.

Equity Rule 38. *O'Neill v. O'Neill*, 508.

Equity Rule 40. *Ibid.*

Report.

An appeal from an interlocutory decree granting an injunction in a suit in equity cannot be brought before this court before final decree upon a report which relates only to the correctness of an interlocutory decree overruling a demurrer to the bill; and it therefore must be dismissed. *Digney v. Blanchard*, 235.

Appeal.

On an appeal from a final decree in a suit in equity, where there is no report of the evidence, the only question for this court is whether the decree conforms to the allegations of the bill and lawfully can be entered on the facts found by the trial judge. *Marion Street Garage Co. v. Sugden*, 130.

An appeal from an interlocutory decree granting an injunction in a suit in equity cannot be brought before this court before final decree upon a report which relates only to the correctness of an interlocutory decree overruling a demurrer to the bill; and it therefore must be dismissed. *Digney v. Blanchard*, 235.

Proceedings for Contempt.

In proceedings for contempt for violation of a temporary injunction in a suit in equity the merits of the suit in which the injunction was granted are not involved and are not open for examination. *Irring & Casson-A. H. Davenport Co. v. Howlett*, 560.

In such proceedings in a suit in equity where the court has jurisdiction of the subject matter and the parties the only question open is whether the order of the court has been disobeyed, and there can be no hearing in the contempt proceedings of the question whether or not the injunction is broader than the bill warrants or to determine whether on a final hearing the injunction should be dissolved. *Ibid.*

ESTATES ON CONDITION.

Conditions subsequent are not favored in the law, and a deed will not be construed to create an estate on condition unless the language used necessarily imports a condition or the intent of the grantor to create an estate on condition is indicated clearly and unequivocally. *Amory v. Amherst College*, 374.

ESTOPPEL.

The mere facts, that a carload of oats was shipped by a bill of lading to the seller's order, that the bill of lading was indorsed by the seller and was attached to a draft upon the purchaser for the amount of the purchase price less the freight, and that the purchaser, without examining the contents of the car, paid the draft and received the carload, were held not as a matter of law to estop the purchaser from rescinding the sale upon discovering that the oats are not of the quality which he agreed to purchase. *Cavanaugh v. D. W. Ranlet Co.* 366.

Question, whether the purchaser waived the warranty, was held to have been one to be determined as a question of fact. *Ibid.*

EVIDENCE.

Judicial Notice.

This court does not take judicial notice of the authority of town officials in the Kingdom of Italy in regard to the keeping of records. *Derinza's Case*, 435.

It seems that in order that a certificate of a foreign marriage should be received in evidence, there must be proof either of a statute of the foreign State or nation requiring the record to be made or of some legal obligation or established practice requiring the keeping of the record or of some fact respecting the authenticity of the record or the effect of which the court can take judicial notice. *Ibid.*

Objection, raised for the first time in this court, to consideration by the Industrial Accident Board of the value of an Italian lira in United States money without proof, which if it had been raised at the proper time easily could have been met by the introduction of the required evidence, was held not to be open to the insurer. *Ibid.*

Matters of Common Knowledge.

It has become a matter of common knowledge that physical harm is likely to follow contact with a wire charged with an electric current and also that copper wires are used for the transmission of such a current. *Chartier v. Earre Wool Combing Co. Ltd.* 153.

Presumptions and Burden of Proof.

Applications of the doctrine, *res ipsa loquitur*, see appropriate subtitle under NEGLIGENCE.

The depositing of a letter properly addressed with postage prepaid in the regular mail chute of an office building with directions for the return of the letter if not delivered printed on the envelope, and the fact that the letter was not returned, are *prima facie* evidence that the letter was received, there being a presumption of fact that the post officials and employees did their duty. *Tobin v. Taintor*, 174.

Application of the foregoing principle to the proof of the proper giving of notice under St. 1908, c. 305. *Ibid.*

Evidence (continued).

In an action of contract, it was said, that, the burden being on the plaintiff to prove the contract and the letters by which the contract was made showing the extinction of a charge of \$900 by an agreement to pay \$200 a month in the coming year, there was no ground for saying that the burden was on the defendant to prove a defence of accord and satisfaction. *Tuttle v. Metz Co.* 272.

In a case under the workmen's compensation act, evidence as to whether an employer had furnished "reasonable medical and hospital services" under St. 1914, c. 708, § 1, although it would have supported a finding by inference that arrangements for the treatment of employees at a hospital had been made, did not require such an inference as matter of law, so that a finding by the Industrial Accident Board that there was no evidence that any arrangements had been made to furnish treatment was warranted. *Ripley's Case*, 302.

In an action against a husband and wife jointly for double damages due to a bite of a dog, it was said that the mere fact of ownership by the wife of the farm on which the dog was kept by the husband was not sufficient to raise an inference of the joint keeping of the dog by the husband and wife and thereby to overcome the presumption of the exercise of dominant authority by the husband and of compliance by the wife. *McIntire v. Leland*, 348.

In an action by a physician for charges for services rendered to the wife and minor child of the defendant, where there is evidence that the defendant knew that the services were being rendered, and no evidence that the defendant ever had forbidden the plaintiff to render or his wife or child in the plaintiff's presence to receive the services of the plaintiff on his account, certain private instructions of the defendant to his wife were held not to rebut the presumption of the agency of the wife to pledge her husband's credit for medical services that are reasonably necessary for her or the family. *Vaughan v. Mansfield*, 352.

Therefore in such an action it is right for the presiding judge to refuse to rule at the request of the defendant "that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself." *Ibid*.

Upon the issue, on a petition for the registration of the title to land, whether an attaching creditor under whom the plaintiff claimed title had before his attachment of the land actual knowledge of the existence of an unrecorded deed under which the defendant claims title, it was held that the burden of proof is on the respondent to establish this affirmative defence. *Hughes v. Williams*, 467.

Admissions.

Where at the trial of an action of contract a material issue is, whether a certain agreement for the sale of real estate, purporting to be signed and sealed by the defendant's husband as her agent, was authorized by her, testimony of a witness, that at a trial of another action between different parties he heard the defendant testify that she gave full authority to her husband to do with her property as he pleased, is admissible. *Siegel v. Thern*, 172.

In an action against a machine company for injury to the plaintiff's horse and

wagon from being run into by a motor truck belonging to the defendant by reason of the negligence of the driver of the truck, where it appeared that a milk company had hired the motor truck from the defendant and that it was driven by an employee of the milk company, it was held that a failure of the manager of the defendant to reply to a statement of the agent of the milk company, "I told him that, if I put on my driver, he would have to be responsible for it," even if it was evidence of an implied assent to the proposition made to him, was not evidence that the driver was the servant of the defendant, which never had hired him. *Melchionda v. American Locomotive Co.* 202.

In an action of tort, where it was material for the plaintiff to show that he had paid off a mortgage on personal property belonging to him held by the defendant as mortgagee, failure of the defendant to produce his ledger, when called for by the plaintiff, as well as the credibility of his explanation of his failure, are competent for the consideration of the jury. *Mikkelson v. Connolly*, 360.

Actions involving determination of the question, what inferences should be drawn from the failure to call certain witnesses. *Little v. Massachusetts Northeastern Street Railway*, 244; *Mikkelson v. Connolly*, 360.

Inferences.

Circumstantial evidence at the hearing of a libel for divorce brought by a husband and charging adultery, which was held to warrant the judge in drawing an inference that the libellant, deliberately throwing the libellee off her guard, gave her money intending to aid her in carrying out her purpose in going on her adulterous enterprise, and in ruling as a matter of law that the libellant was guilty of connivance and dismissing the libel. *Leavitt v. Leavitt*, 196.

The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him. *Little v. Massachusetts Northeastern Street Railway*, 244.

Application of the foregoing principle in an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate by reason of the carriage in which he was driving being overturned when the defendant's motorman, as the plaintiff alleged, sounded the whistle on his car as he was opposite the carriage and the horses were frightened, where the motorman was available but was called by neither party and the judge left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call the motorman as a witness. *Ibid.*

On the evidence at the trial of an action of tort for the alleged wrongful taking of certain household furniture under the claim of a mortgage which the plaintiff contended had been paid and discharged, where the evidence showed that the defendant employed a certain expressman to go to the plaintiff's house and remove the furniture,¹ instructions by the presiding judge permitting the jury to infer that the testimony of the men employed by this expressman who took the furniture away, if they had been produced as witnesses, would have been unfavorable to the contention of the defendant, were held in this respect to have been erroneous because under the circumstances shown no inference properly could have been drawn from

Evidence (continued).

the failure to call these witnesses that their testimony, if given, would have been favorable to the contention of either party. *Mikkelson v. Connolly*, 360.

Competency.

In an action against the proprietor of a store for personal injuries alleged to have been sustained when the plaintiff stumbled upon matting upon the floor, evidence that at a time after the accident another person fell over the same matting when it was in the same position that it was at the time of the accident was said to have been clearly inadmissible. *Hathaway v. Chandler & Co. Inc.* 92.

At the trial of an action by a passenger against a railroad corporation for injuries caused by a door of a car closing on the plaintiff's hand as she was leaving the car, it was held that a question, asked by the plaintiff in cross-examination of a conductor of the train, as to how many brakemen the law required a railroad to have on the platform of its trains, properly was excluded. *MacGill-Allen v. New York, New Haven, & Hartford Railroad*, 162.

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, it appeared that the authority of the treasurer of the corporation was limited, and it was held that he had no authority to bind the corporation by his letters, accounts, statements or bookkeeping entries, so that evidence of that character should not have been admitted. *Amory v. Amherst College*, 374.

In an action against an elevated railway company for personal injuries received when the plaintiff fell between the train and a temporary platform of a station, it was held not to have been reversible error to exclude a question of a motorman in the defendant's employ, whether the defendant ran any trains of five cars between eleven and twelve o'clock at night, as it did not appear, and the defendant had made no offer to prove, that the witness's knowledge of the train operations of the defendant was so comprehensive as to make his testimony on that subject of any value. *Harrington v. Boston Elevated Railway*, 421.

In the same case evidence introduced by the plaintiff in rebuttal to contradict testimony introduced by the defendant to the effect that its expert did not know of any place where sliding platforms were used for a ten inch space or for any space less than fifteen or sixteen inches, it was held, could not be said to be wholly incompetent. *Ibid.*

In an action for loss of the plaintiff's horse which by reason of a defective planking at a grade crossing fell upon the rails and was run over by a train, it was held that evidence as to the height of the gates at the crossing and whether the engineer could have seen that they were raised was admissible in connection with other evidence upon the question, whether he was running the train at an unreasonable rate of speed as he approached the crossing, *Clapp v. New York, New Haven, & Hartford Railroad*, 532.

In the same case it was held that evidence as to the speed of the train was competent for the same purpose. *Ibid.*

Relevancy and Materiality.

At the trial of an action by a passenger against a railroad corporation for injuries caused by a door of a car closing on the plaintiff's hand as she was leaving the car, it was held that it was proper, where there was no evidence to show that the brakeman opened the door, to exclude a question asked the conductor as to whether the brakeman "was . . . in the habit of fastening the door back, opening the door." *MacGill-Allen v. New York, New Haven, & Hartford Railroad*, 162.

Exception to the admission, at the trial of an action for breach of a contract for the sale of certain real estate by the defendant to the plaintiff, of testimony as to the value of the real estate by a real estate expert who stated that he viewed the premises about three weeks before the trial, on the ground that the evidence related to the value of the premises at the time of the trial and not at the time of the breach of the contract, was overruled, because the record did not show that the witness was permitted to testify as to the value of the premises at the time of the trial. *Siegel v. Thern*, 172.

In an action against a firm of insurance brokers for damages resulting from negligence of another broker, alleged to be their agent, in failing to procure an assent of an insurance company to a change of location of furniture, upon the issues, whether the negligent broker was the defendants' agent and was acting within the scope of his authority, it was relevant and material to show that the agent had been allowed a commission by the defendants when the policy in question was issued to the plaintiff; that, on the occasion of a previous removal by the plaintiff, he had given the policy to the agent who had given it to the defendants and that they had indorsed upon it their assent to the removal and had returned it to the agent, who had returned it to the plaintiff, as well as the relations between the agent and the defendants as to the insurance company for whom he held a broker's license procured by them. *Damon v. Kaler*, 215.

In an action by a tenant at will for alleged conspiracy between a landlord, a constable and a real estate agent resulting in the eviction of the plaintiff in proceedings by summary process in which the constable was plaintiff, claiming under title a lease in writing from the landlord, it was held that questions addressed to the defendant landlord touching upon his motive for doing his lawful act were excluded properly as immaterial and having no tendency to prove the conspiracy alleged. *De Wolfe v. Roberts*, 410.

In the same case it was pointed out that, as a verdict for the plaintiff would not have been warranted, the exclusion of evidence relating to damages was immaterial. *Ibid.*

In an action of tort for personal injuries alleged to have been sustained by reason of the defendant's negligence, all the circumstances under which the injuries were received ordinarily may be put in evidence and a considerable degree of discretion is vested in the presiding judge at the trial as to admitting evidence to show the incidents immediately preceding and attendant upon the accident. *Harrington v. Boston Elevated Railway*, 421.

In an action against an elevated railway company for personal injuries received when the plaintiff stepped between a temporary platform and the platform of a car, the admission by the presiding judge of a question addressed to the plaintiff as a witness, whether as she was about to enter the

Evidence (*continued*).

car she was "in a position where" she "would have heard if anything had been said in regard to the space," was held not to be reversible error. *Harrington v. Boston Elevated Railway*, 421.

In the same case it was held that the plaintiff properly was allowed to show by the defendant's engineer that the temporary location of the defendant's platform and tracks at that station, as they were for a period of about eight weeks including the time of the plaintiff's injuries, was not approved by the railroad commission. *Ibid*.

It was held that, although it would have been a wiser exercise of discretion by the presiding judge to have excluded a question tending to bring out the fact that an expert engineer, called as a witness by the plaintiff, had been employed by the defendant as an expert in engineering, yet the evidence was not strictly incompetent and its admission was not reversible error. *Ibid*.

Opinion: Experts.

Testimony of the plaintiff in an action for personal injuries against a street railway company, stating the advice of a physician, deceased at the time of the trial, given to the plaintiff as his patient and based on his opinion of her nervous condition, could not have been found to have been made upon the personal knowledge of the declarant, and was held not to be admissible under R. L. c. 175, § 66. *Keough v. Boston Elevated Railway*, 275.

In an action for breach of an agreement of the defendant to use its best efforts to sell a trade marked corset called "Cresco," where it appeared that the "Cresco" corset was a "specialty" corset which was sold on the market by methods not common in the sale of standard corsets, the best methods to employ for its sale were held to be proper subjects for expert testimony, the evidence being helpful, if not necessary, to assist the jury to determine whether the defendant had used its utmost endeavors to manufacture and sell the "Cresco" corset. *Wright v. Maynard Corset Co.* 343.

In an action against an elevated railway corporation for personal injuries resulting from a fall between a temporary platform and a car, it was held that an expert engineer properly was permitted to testify that in his opinion the temporary platform in use at the time of the plaintiff's injuries was not a reasonably proper structure, this being a matter of engineering skill applied to complicated conditions and outside the range of common knowledge. *Harrington v. Boston Elevated Railway*, 421.

At the trial of issues relating to the soundness of mind of a testatrix, a physician, who was not an expert in mental diseases and who had attended the late husband of the testatrix in his last illness but never had attended the testatrix professionally, was asked, "In your opinion what was her mental development, I mean the maturity of her mind?" and it was held that the answer properly was excluded as calling for opinion. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

In the same case it was said that, if the counsel for the contestant did not wish to abide by the ruling of the judge excluding the question quoted above, he should have made it plain to the judge that the question called for a statement of the facts observed by the witness and not for the witness's opinion, and that, not having done this, it was not open to the contestant to contend that the question did not call for an expression of opinion as it purported to do. *Ibid*.

Declarations of Deceased Persons.

Testimony of the plaintiff in an action for personal injuries against a street railway company, stating the advice of a physician, deceased at the time of the trial, given to the plaintiff as his patient and based on his opinion of her nervous condition, could not have been found to have been made upon the personal knowledge of the declarant, and was held not to be admissible under R. L. c. 175, § 66. *Keough v. Boston Elevated Railway*, 275.

The fact that the plaintiff acted upon the advice of her physician did not make the advice admissible under the statute. *Ibid.*

In actions against a town by three children for alleged unlawful exclusion from the public schools on the ground that they had head lice, it was held that a certificate made by a physician who had died before the trial, stating that he had examined the heads of the plaintiffs and had found no vermin, properly was admitted in evidence under R. L. c. 175, § 66, after having been found by the presiding judge to be the declaration of a deceased person made in good faith before the commencement of the action and upon the personal knowledge of the declarant. *Carr v. Dighton*, 304.

At the trial of an issue of the soundness of mind of a testatrix, it was held justifiable for the judge to refuse to allow a cousin of the testatrix to testify that the witness's mother, long since dead, had told her between fifty and sixty years ago that a brother of her father, who also was an uncle of the testatrix, shot himself and committed suicide about 1836. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

Extrinsic affecting Writings.

Although where the words of a contract in writing are ambiguous the extrinsic circumstances under which it was written may be shown by oral evidence to enable the court to view the words in the same light that the parties did, yet where the extrinsic facts are not in dispute, or after their existence has been shown, the construction of the ambiguous instrument in the light of these circumstances is for the court. *Arcade Malleable Iron Co. v. Jenks*, 95.

Subsequent letter between the parties was held not to be admissible as completing the memorandum required to satisfy the statute if the defendant in the subsequent letter did not acknowledge the guaranty contained in the first letter as having been made by him. *Ibid.*

A custom of tenants of a building in abrogation of a requirement of a lease that an elevator shall not be used for other than freight purposes, not in existence when a lease of one floor was made, has no effect to contradict the clear and unambiguous covenant of the lease, and evidence of it is not admissible to vary the provisions of the lease. *Follins v. Dill*, 321.

Remarks of a presiding judge, who had admitted, subject to the defendant's exception, certain evidence which might have been excluded as relating to oral conversations that afterwards were merged in and superseded by the contract in writing, postponing instructing the jury on the question until "later on," where the matter was not again called to his attention and in his charge he instructed the jury in accordance with the contention of the defendant, were held to give to the defendant no ground for exception. *Wright v. Maynard Corset Co.* 343.

Evidence (continued).

In an action for a bonus agreed to be paid to the plaintiff upon his inventing a patentable improvement to a machine of the defendant, or, at his option, a new machine for the same purpose, it appeared that the contract sued upon was an oral one, although a condensed written statement of it, which did not embody the whole of the contract between the parties, was prepared for record in the Patent Office, and it was held that this written statement was not a contract in writing which precluded the plaintiff from recovering on the oral agreement. *Hill v. Reece Buttonhole Machine Co.* 544.

Circumstantial.

Circumstantial evidence, at the trial of an action against a corporation that had been engaged in blasting for the construction of a sewer, for alleged damage to the plaintiff's house by an explosion was held to warrant a finding that the explosion occurred in the sewer that was being constructed by the defendant and that the defendant was careless in doing the blasting. *Coffey v. West Roxbury Trap Rock Co.* 211.

Self-serving Statement.

In an action of contract letters written by the plaintiff to one of the defendants, which were not a part of a mutual correspondence between the parties and were not in reply to any communication from the defendant to whom they were addressed and were not referred to afterwards in any conversation between the parties and which remained unanswered, cannot be put in evidence by the plaintiff, being excluded properly as self-serving statements. *Kumin v. Fine*, 75.

Testimony of the plaintiff, at the trial of an action by a woman against a corporation operating a street railway for personal injuries, as to certain statements which she made to a physician, who had treated her after her injuries before she went on a vacation with her husband and had treated her again after her return from the vacation, was held to have been clearly inadmissible and improperly admitted. *Keough v. Boston Elevated Railway*, 275.

Law and Fact.

At the trial of an action by a real estate broker for a commission, a defence was that the commission, if owed, was owed to the plaintiff as one of a partnership and not as an individual, and it was held that, where the evidence as to such an agreement was conflicting, the question of its existence was for the jury. *Wheelock v. Zevitas*, 167.

Of Agency.

In an action against a machine company for injury to the plaintiff's horse and wagon from being run into by a motor truck belonging to the defendant by reason of the negligence of the driver of the truck, where it appeared that a milk company had hired the motor truck from the defendant and that it was driven by an employee of the milk company, it was held that a failure of the manager of the defendant to reply to a statement of the agent of the milk company, "I told him that, if I put on my driver, he would have

to be responsible for it," even if it was evidence of an implied assent to the proposition made to him, was not evidence that the driver was the servant of the defendant, which never had hired him. *Melchionda v. American Locomotive Co.* 202.

Of Bad Faith.

In an action against a corporation upon a contract to indemnify dependents of an employee who had been injured or killed while in the course of his employment, where it appeared that a committee, relying on the report of an investigator, found that the plaintiff was not a dependent of the employee, it was held that, under the circumstances, the complete reliance of the committee on a report of facts made by the investigator was not evidence of bad faith, there being nothing to indicate that they had any reason to distrust the investigator's faithfulness, accuracy or soundness of judgment. *Clark v. New England Telephone & Telegraph Co.* 1.

Of Mental Condition.

Upon the issue of the soundness of mind of an alleged testatrix, an exclusion by the presiding judge as evidence of a certified copy of a decree of the Probate Court appointing a guardian for an uncle of the testatrix as "an insane person, and incapable of taking care of himself" was held under the circumstances to have been a proper exercise of judicial discretion. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

In the same case a physician, who was not an expert in mental diseases and who had attended the late husband of the testatrix in his last illness but never had attended the testatrix professionally, was asked, "In your opinion what was her mental development, I mean the maturity of her mind?" and it was held that the answer properly was excluded as calling for opinion. *Ibid.*

In the same case it was said that, if the counsel for the contestant did not wish to abide by the ruling of the judge excluding the question quoted above, he should have made it plain to the judge that the question called for a statement of the facts observed by the witness and not for the witness's opinion, and that, not having done this, it was not open to the contestant to contend that the question did not call for an expression of opinion as it purported to do. *Ibid.*

In the same case it was held justifiable for the judge to refuse to allow a cousin of the testatrix to testify that the witness's mother, long since dead, had told her between fifty and sixty years ago that a brother of her father, who also was an uncle of the testatrix, shot himself and committed suicide about 1836. *Ibid.*

Letters.

In an action of contract letters written by the plaintiff to one of the defendants, which were not a part of a mutual correspondence between the parties and were not in reply to any communication from the defendant to whom they were addressed and were not referred to afterwards in any conversation between the parties and which remained unanswered, cannot be put in evidence by the plaintiff, being excluded properly as self-serving statements. *Kumin v. Fine*, 75.

Of Oral Trust.

In a suit to enforce an oral trust in savings bank deposits, it was stated that the testimony of the plaintiff, that in the presence of the defendant she told the officers of the savings banks that she wanted the deposits put in the joint names of herself and the defendant so that she could draw money when she "went down East," plainly was admissible. *Bradford v. Eastman*, 499.

Of Value.

In an action by a real estate broker against his principal, which was held to be barred because of the broker's conduct, it was said that it was not necessary to decide whether the United States revenue stamps placed on the deeds mutually delivered by the parties to the exchange of real estate were competent evidence of the value of the property conveyed, or whether they were admissible for any purpose. *Tracey v. Blake*, 57.

Exception to the admission, at the trial of an action for breach of a contract for the sale of certain real estate by the defendant to the plaintiff, to testimony as to the value of the real estate by a real estate expert who stated that he viewed the premises about three weeks before the trial, on the ground that the evidence related to the value of the premises at the time of the trial and not at the time of the breach of the contract, was overruled, because the record did not show that the witness was permitted to testify as to the value of the premises at the time of the trial. *Siegel v. Thern*, 172.

Internal Revenue Stamps.

In an action by a real estate broker against his principal, which was held to be barred because of the broker's conduct, it was said that it was not necessary to decide, whether the United States revenue stamps placed on the deeds mutually delivered by the parties to the exchange of real estate were competent evidence of the value of the property conveyed, or whether they were admissible for any purpose. *Tracey v. Blake*, 57.

Proof of Foreign Marriage.

R. L. c. 151, § 37, in regard to proof of marriage, does not apply to records of foreign marriages. *Derinza's Case*, 435.

It seems that, in order that a certificate of a foreign marriage should be received in evidence, there must be proof either of a statute of the foreign State or nation requiring the record to be made or of some legal obligation or established practice requiring the keeping of the record or of some fact respecting the authenticity of the record of the effect of which the court can take judicial notice. *Ibid.*

In a claim under the workmen's compensation act, error in admitting incompetent evidence of the marriage of the deceased employee and of the births of his children in alleged copies of certificates was held to have been harmless because the widow of the deceased employee in her deposition testified to the fact of her marriage with the deceased and to the birth of their three children and their ages, and this testimony was uncontradicted. *Ibid.*

Of Incompetence of Fellow Employee.

While incompetence of an employee may be shown by evidence of a general reputation to that effect, evidence tending merely to show that an employee was addressed by a few of his fellow employees as "crazy" is not sufficient to warrant a finding of such a reputation. *Dennis v. Clyde, New England & Southern Lines*, 502.

Evidence which, it was held, would not warrant a finding of such knowledge of the dangerous character of the workmen as will render the employer liable in an action by the second fellow workman for personal injuries received by him when he afterwards was assaulted by the alleged dangerous workman. *Ibid.*

Inconsistent Statements of Witness.

In an action by an employee of an independent contractor for the construction of a building against the general contractor the plaintiff called the defendant as a witness, and he on his direct examination made a statement that all the persons who worked on the building did so under his direction, but, it being plain that he was referring to the subcontractors and not to the men in their employ, it was held that this was no evidence that he was responsible for the injury. *Kettleman v. Atkins*, 89.

In the case stated above it was pointed out that the conclusion reached in regard to the defendant's testimony was not at variance with the well established rule that if a witness in testifying makes inconsistent statements the jury may believe some of the statements and disregard others, because the defendant's statements understood in their obvious meaning were not inconsistent. *Ibid.*

Failure to Produce Evidence.

The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him. *Little v. Massachusetts Northeastern Street Railway*, 244.

Application of the foregoing principle in an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate by reason of the carriage in which he was driving being overturned when the defendant's motorman, as the plaintiff alleged, sounded the whistle on his car just as he was opposite the carriage and the horses were frightened, where the motorman was available but was called by neither party and the judge left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call the motorman as a witness. *Ibid.*

In an action of tort, where it was material for the plaintiff to show that he had paid off a mortgage on personal property belonging to him held by the defendant as mortgagee, failure of the defendant to produce his ledger, when called for by the plaintiff, as well as the credibility of his explanation of his failure, are competent for the consideration of the jury. *Mikkelsen v. Connolly*, 360.

On the evidence at the trial of an action of tort for the alleged wrongful taking of certain household furniture under the claim of a mortgage which the plaintiff contended had been paid and discharged, where the evidence showed that the defendant employed a certain expressman to go to the

Evidence (*continued*).

plaintiff's house and remove the furniture, instructions by the presiding judge permitting the jury to infer that the testimony of the men employed by this expressman who took the furniture away, if they had been produced as witnesses, would have been unfavorable to the contention of the defendant, were held in this respect to have been erroneous because under the circumstances shown no inference properly could have been drawn from the failure to call these witnesses that their testimony, if given, would have been favorable to the contention of either party. *Mikkelsen v. Connolly*, 360.

In Proceedings under the Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

EXECUTION.

It was pointed out that a claim for unliquidated damages arising from a breach of a contract cannot be reached to be attached or taken on execution in an action at law against the plaintiff by one of his creditors. *Digney v. Blanchard*, 235.

EXECUTOR AND ADMINISTRATOR.

In a suit in equity, by certain minors entitled to the remainders under a trust created by a will, to set aside a mortgage made by the former executors of the will, acting as trustees, to the defendants to secure the payment of indebtedness of the executors to the defendants for shoes sold the executors while they were carrying on the retail shoe business of the testator after his death in the name of his estate, it was held that the mortgage must be set aside. *Donnelly v. Alden*, 109.

In the suit above described, it also was held that the defendants, knowing of the death of the testator, ought to have inspected the probate records, which would have shown them that the executors had no authority to conduct the business and would have led to the further discovery that the persons interested in the remainder were minors, and that a finding of the trial judge as to the actual state of mind of the defendants was immaterial. *Ibid.*

In a suit in equity by the members of a firm of shoe dealers against the administrators *de bonis non* of the estate of a testator, the executors of whose will had continued his business and had purchased merchandise of the plaintiffs as executors, to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*, it appearing that the goods might have been identified and separated, but that they were not and that afterwards all the goods in the store had been sold for a single price, it was held that it was too late for the plaintiffs to rescind

their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds. *Donnelly v. Alden*, 109.

In a cross bill filed by the administrators *de bonis non*, who were the defendants in the suit described above, in which the remaindermen joined through their guardian *ad litem*, it was sought to compel the firm of wholesale shoe dealers to repay the amount of money paid to them by the former executors without authority, but it did not appear that the business was conducted by the executors at a loss and, therefore, there being no debt to the estate to be paid, the cross bill was dismissed. *Ibid.*

Further funds, collected by an administrator *de bonis non* with the will annexed of the estate of a testator upon an item entered in his inventory as a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will, were held not to be new assets within the meaning of R. L. c. 141, §§ 11, 18. *Shattuck v. Burrage*, 448.

In the same case it was said that it was unnecessary to determine in that case whether the words "new assets" as used in the statute included such equitable assets as a fund appointed by a debtor testator to persons other than his creditors by the exercise of a power of testamentary appointment. *Ibid.*

Release executed by one, who had suffered an injury by reason of the negligence of a street railway corporation, was held, in case of the subsequent death of the injured person, not to bar an action brought by the executor of his will under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, 392, § 1; 1911, c. 635; 1912, c. 354, to enforce the penalty for causing his death by the negligent act that caused the injury specified in the release. *Wall v. Massachusetts Northeastern Street Railway*, 506.

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York but whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

A voluntary payment of a debt to an executor of the will of the creditor appointed in another State by the law of which he is authorized to receive it is valid. *Morrison v. Berkshire Loan & Trust Co.* 519.

Payment of a debt by a trust company in this Commonwealth to the New York executor under such circumstances without invoking the protection of our courts was held to have been valid. *Ibid.*

In the same case it was pointed out St. 1909, c. 527, § 7, had no application to the action. *Ibid.*

Executor and Administrator (*continued*).

In the same case it was said that R. L. c. 148, § 3, not having been relied upon by the plaintiff nor referred to by him as applicable, need not be considered. *Morrison v. Berkshire Loan & Trust Co.* 519.

FALSE REPRESENTATIONS.

See DECEIT.

FIRE.

Insurance against loss by fire, see appropriate subtitle under INSURANCE.

FISHERY.

OYSTER FISHERY, see that title.

FRANCHISE.

Under the Constitution of the Commonwealth and the second amendment thereof the Legislature has no power to pass a general law enabling such towns as may adopt its provisions to substitute for the town meeting form of government, in which every qualified voter of the town may participate, a form wherein the town meeting shall consist of a certain percentage of the voters elected as town meeting members, so called, by the voters at large. *Opinion of the Justices*, 601.

FRAUD.

An assurance, that by putting \$330 into a "voting contest" the person to whom the statement is addressed will "win the automobile and also the grafonola that was put up as a special prize," is not a statement by words or conduct of present or past material facts, but is a mere promise or conjecture as to future events and, if the prophecy is proved to have been a false one made with the intention to deceive and to have been relied upon, this does not give a right to an action in tort for deceit. *Brown v. C. A. Pierce & Co. Inc.* 44.

In an action of contract for money had and received to recover the amount of a sum of money entrusted to the defendant to put into a "voting contest" on the ground that the plaintiff was induced to part with the money by misrepresentations made to him by the defendant, if it appears that the alleged misrepresentations did not relate to facts but to conjectures as to future events and would not give a cause of action for deceit, the plaintiff cannot recover. *Ibid.*

In a suit in equity by the members of a firm of shoe dealers against the administrators *de bonis non* of the estate of a testator, the executors of whose will had continued his business and had purchased merchandise of the plaintiffs as executors, to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*, it appearing that the goods might have been identified and separated, but that they were not and that afterwards all the goods in the store had been sold for a single price, it was held that it was too late for the plaintiffs to rescind

their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds. *Donnelly v. Alden*, 109.

See also DECEIT; EVIDENCE, *Of Bad Faith*; UNDUE INFLUENCE.

FRAUDS, STATUTE OF.

A letter, "I will personally see to it that your bill is met on the 15th of each month. . . . Yours very truly, G C Co., By H E J.," it was held as matter of law, was not to be such a memorandum signed by H E J as would satisfy the requirements of the statute of frauds as a guaranty by him of the account of the corporation, G C Co., and that it could not be found by a jury to have been signed by him. *Arcade Malleable Iron Co. v. Jenks*, 95.

Subsequent letter between the parties was held not to be admissible as completing the memorandum required to satisfy the statute if the defendant in the subsequent letter did not acknowledge the guaranty contained in the first letter as having been made by him. *Ibid*.

Upon performance by an owner of real estate of an oral agreement with the owner of a second mortgage upon the property that, if the owner of the real estate would discharge a contract which he had made for the sale of the property and would appear at a sale in foreclosure of the second mortgage, and would not bid in the property, the second mortgagee would sell the property to the purchaser to whom the owner had agreed to sell it and would pay the owner a certain amount of money, the mortgagee's oral agreement to pay a sum of money is not within the statute of frauds. *Rosenberg v. Drooker*, 205.

Where, at the trial of an action for a breach of a warranty of quality in an oral contract of sale to the plaintiff of four carloads of oats, it appears that three of the carloads were accepted by the plaintiff and were paid for, the statute of frauds is not a defence. *Cavanaugh v. D. W. Ranlet Co.* 366.

GARAGE.

In a suit in equity, by a corporation established for the purpose of carrying on the business of a public garage and licensed to conduct such a business, to restrain alleged unlawful interference with its business, the bill must be dismissed if the plaintiff fails to prove that it was engaged in the business of carrying on a public garage. *Marion Street Garage Co. v. Sugden*, 130.

GRADE CROSSING.

The public service commission, in making an apportionment of costs incurred by reason of the changes at Silsbee Street in Lynn under St. 1912, c. 492, § 15, in connection with the abolition of grade crossings of highways with the railroad, was substituted in place of the special commission provided for in St. 1906, c. 463, Part I, § 29. *Bay State Street Railway v. Public Service Commissioners*, 399.

Orders and rulings made by them in making such an apportionment were not orders and rulings made by them as a State board or commission. *Ibid*. Such orders and rulings therefore are not reviewable by the Supreme Judicial Court under St. 1906, c. 463, Part III, § 157, or under St. 1913, c. 784, § 27. *Ibid*.

GUARANTY.

A letter, "I will personally see to it that your bill is met on the 15th of each month. . . . Yours very truly, G C Co., By H E J.," it was held as matter of law, was not to be such a memorandum signed by H E J as would satisfy the requirements of the statute of frauds as a guaranty by him of the account of the corporation, G C Co., and that it could not be found by a jury to have been signed by him. *Arcade Malleable Iron Co. v. Jenks*, 95.

A statement in an editorial published in a newspaper, that the owner of the paper for years has guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default. *Heathcote v. Curtis Publishing Co.* 569.

GUARDIAN.

Propriety of permitting further accounting and credits to a guardian after a rescript upon an appeal from a decree disallowing his final account. *Ensign v. Faxon*, 231.

HAWKERS AND PEDLERS.

A suit in equity cannot be maintained by one engaged in business to enjoin the chief of police of a city from committing an alleged apprehended unlawful interference with the plaintiff's business by instituting a complaint against the plaintiff for an alleged violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1, in regard to hawkers and pedlers, by exhibiting samples of goods in a room hired in a hotel in that city without first obtaining a license. *Shuman v. Gilbert*, 225.

HEALTH, BOARD OF.

See BOARD OF HEALTH.

HIGHWAY.

See WAY, Public.

HUSBAND AND WIFE.

Where a husband conveys property to his wife, without any agreement on the part of the wife as to the way in which she shall hold it, there is no presumption that it is received in trust and the wife as between herself and her husband holds the property absolutely, an unexpressed intention of the husband in making the conveyance being immaterial as between the parties to it. *English v. English*, 11.

Where a husband, before obtaining a divorce from his wife for desertion, made use of a power of attorney, given to him by her before she left her home, to convey her real estate through a third person to himself, it was

held that the wife could maintain a suit in equity against her former husband to set aside the conveyance, the authority given by the power of attorney being restricted necessarily and designed for the benefit of the owner of the real estate and conferring on the husband no right to convey the property to himself for his own advantage to the detriment of the owner. *English v. English*, 11.

The provision contained in R. L. c. 80, § 6, (repealed by St. 1911, c. 669, § 7,) that "A person who is absent from the Commonwealth for ten consecutive years shall lose his settlement," does not apply to the derivative settlement of a wife, which she acquired by marrying a man then having a settlement in this Commonwealth which he afterwards lost by leaving the Commonwealth and remaining continuously absent for ten years thereafter while his wife continued to live in this Commonwealth without acquiring any other settlement. *Treasurer & Receiver General v. Boston*, 83.

Where the facts are not such as to bring the case within the provisions of St. 1910, c. 576, no action can be maintained against a husband and wife jointly upon a promise implied in law to pay for necessary board furnished to them, the promise which the law implies in such a case being a promise on the part of the husband alone to pay for such necessities. *Lavoie v. Dube*, 87.

In the case deciding the point stated above, the question, whether the plaintiff on the facts of that case could recover against the defendant husband alone, was not before the court. *Ibid*.

Where at the trial of an action of contract a material issue is, whether a certain agreement for the sale of real estate, purporting to be signed and sealed by the defendant's husband as her agent, was authorized by her, testimony of a witness, that at a trial of another action between different parties he heard the defendant testify that she gave full authority to her husband to do with the property as he pleased, is admissible. *Siegel v. Thern*, 172.

Under R. L. c. 81, § 10, and St. 1909, c. 504, § 82, the Treasurer and Receiver General may recover in an action against a father, living in this Commonwealth and of sufficient ability, for the support in a State hospital for the insane of his daughter, who at the time of her committal was more than twenty-one years of age and was married to a man then living in this Commonwealth and continuing to reside here. *Treasurer & Receiver General v. Sermini*, 248.

In such an action the erroneous admission, subject to the defendant's exception, of evidence offered and introduced by the plaintiff, that the husband of the insane person was not of sufficient ability to pay for her support, does not harm the defendant, as he would have been none the less liable if it had appeared that the husband of his daughter was of sufficient ability to support her. *Ibid*.

It also was said that, although the Treasurer and Receiver General was not bound to resort to his remedy against the husband if of sufficient ability to support his wife, he was at liberty to do so. *Ibid*.

On the evidence at the trial of an action under R. L. c. 102, § 146, by a boy against a husband and wife to recover double damages for having been bitten by a dog alleged to have been kept by the defendants jointly or by one of them individually, it was held that a finding was not warranted that

Husband and Wife (continued).

the defendants jointly were the keepers of the dog or that the defendant wife was its keeper, but that a finding was warranted that the defendant husband was the keeper of the dog. *McIntire v. Leland*, 348.

In the same case it was said that the mere fact of ownership by the wife of the farm on which the dog was kept by the husband was not sufficient to raise an inference of the joint keeping of the dog by the husband and wife and thereby to overcome the presumption of the exercise of dominant authority by the husband and of compliance by the wife. *Ibid*.

In an action by a physician for charges for services rendered to the wife and minor child of the defendant, where there is evidence that the defendant knew that the services were being rendered, and no evidence that the defendant ever had forbidden the plaintiff to render or his wife or child in the plaintiff's presence to receive the services of the plaintiff on his account, certain private instructions of the defendant to his wife were held not to rebut the presumption of the agency of the wife to pledge her husband's credit for medical services that are reasonably necessary for her or the family. *Vaughan v. Mansfield*, 352.

Therefore in such an action it is right for the presiding judge to refuse to rule at the request of the defendant "that the defendant was not liable to the plaintiff for this bill, even if it was for necessities furnished to his wife and minor child, unless the defendant refused or failed or neglected to furnish them himself." *Ibid*.

The requirements of the statutes relating to notice by one injured by a defective condition of a building caused by or consisting in part of snow or ice, are met by a notice to the owner of a building, sent in behalf of a woman by her husband and reading as follows: "My wife fell on the sidewalk in front of a building owned by you on Market Street, Monday morning, Dec. 18, 1916, and injured herself and is now under the care of a doctor. The fall was caused by the icy condition of the sidewalk." *Merrill v. Paige*, 511.

The above notice in writing satisfies the requirements of the statutes although it was signed by the husband in his own name and nowhere contained a statement that he signed it in behalf of his wife. *Ibid*.

ICE.

See SNOW AND ICE.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INFANT.

Father's liability for purchases by infant daughters of hats and veils for use at mother's funeral. *Bisbee v. McManus*, 124.

INSANE PERSON.

Under R. L. c. 81, § 10, and St. 1909, c. 504, § 82, the Treasurer and Receiver General may recover in an action against a father, living in this Common-

wealth and of sufficient ability, for the support in a State hospital for the insane of his daughter, who at the time of her committal was more than twenty-one years of age and was married to a man then living in this Commonwealth and continuing to reside here. *Treasurer & Receiver General v. Sermini*, 248.

In such an action the erroneous admission, subject to the defendant's exception, of evidence offered and introduced by the plaintiff, that the husband of the insane person was not of sufficient ability to pay for her support, does not harm the defendant, as he would have been none the less liable if it had appeared that the husband of his daughter was of sufficient ability to support her. *Ibid.*

It also was said that, although the Treasurer and Receiver General was not bound to resort to his remedy against the husband if of sufficient ability to support his wife, he was at liberty to do so. *Ibid.*

Upon the issue of the soundness of mind of an alleged testatrix, an exclusion by the presiding judge as evidence of a certified copy of a decree of the Probate Court appointing a guardian for an uncle of the testatrix as "an insane person, and incapable of taking care of himself," was held under the circumstances to have been a proper exercise of judicial discretion. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

Evidence of mental condition, see appropriate subtitle under EVIDENCE.

INSURANCE.

Fire.

In an action upon a policy of fire insurance in the Massachusetts standard form to recover for the partial loss of a building by fire, it was held to have been proper for the presiding judge to instruct the jury that in estimating the value of the part of the building remaining the cost of repairing it is a very material matter and that, if the repairs must conform to certain requirements of the building laws, the nature of those requirements must be considered in determining the cost of the necessary repairs. *Second Society of Universalists v. Royal Ins. Co. Ltd.* 294.

In the same case, where the jury under the instructions described above, as amplified and explained by the judge, found that the value of the building before the fire was a certain amount and that its value after the fire was a certain other amount, it also was held that the jury in fixing the fair value of the part of the building remaining after the fire must have considered and have made allowance for the restrictions of the building laws as affecting such value. *Ibid.*

Credit.

A general agent of a credit insurance company has no power or authority by an oral agreement to dispense with or override an express agreement made with the insurance company by an applicant for a policy of credit insurance in his written application for the insurance. *Casman v. American Credit Indemnity Co. of New York*, 278.

Application of the foregoing principle in an action where the insured was held bound by conditions of a policy of credit insurance containing stipulations for a minimum initial loss of \$500 and that the insurance shall be void un-

Insurance (continued).

less the person whose credit is insured is in sound financial condition on the day the premium is paid, although at the time of signing he was assured orally by a special agent of the company to the contrary of the conditions, which he did not read. *Cauman v. American Credit Indemnity Co. of New York*, 278.

Authority of Agent.

A general agent of a credit insurance company has no power or authority by an oral agreement to dispense with or override an express agreement made with the insurance company by an applicant for a policy of credit insurance in his written application for the insurance. *Cauman v. American Credit Indemnity Co. of New York*, 278.

INTERFERENCE.

UNLAWFUL INTERFERENCE, see that title.

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JOINT TORTFEASORS.

In an action of contract by an administrator against the employer of the plaintiff's intestate upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it was no defence that the plaintiff brought an action of tort against another corporation for the injuries and death of the plaintiff's intestate in which he discharged and released the defendant; and consequently it was right for the trial judge to deny a motion of the defendant to be allowed to amend his answer by setting up such an alleged defence. *Clark v. New England Telephone & Telegraph Co.* 1.

JUDGMENT.

It is no bar to the granting of a motion for a special judgment against a bankrupt defendant to enable the plaintiff to bring an action against the sureties on a bond given by such defendant to dissolve an attachment of funds in the hands of a trustee summoned by trustee process, that the same plaintiff also had made a motion for a special judgment upon a bond given to dissolve an attachment by special precept of personal property of the bankrupt which bond the plaintiff did not file but relied upon as a common law bond, and that that motion had been denied. *Cinamon v. St. Louis Rubber Co.* 33.

A judgment rendered in an action at law where the court had jurisdiction of the parties and of the subject matter cannot be impeached collaterally by a party to it either at law or in equity, the only remedy for a person aggrieved by such a judgment being by review or by a proceeding to reverse it upon a writ of error. *Joyce v. Thompson*, 106.

It is no ground for maintaining a suit in equity to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction

of the parties and of the subject matter, that the promissory notes on which the judgment was obtained were executed on Sunday and that the plaintiff had an absolute defence to the action. *Joyce v. Thompson*, 106.

A demurrer to a bill in equity seeking to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, where the bill contains an allegation that the notes on which the judgment was obtained were executed on Sunday, does not admit that the judgment is tainted with illegality and therefore void. *Ibid.*

In an action of contract, where the plaintiff would be entitled to a judgment but for the discharge in bankruptcy of the defendant pleaded as a defence to the action, the plaintiff upon motion is entitled to an order to have judgment entered for him in the sum ascertained, such judgment not to be enforced against the bankrupt personally or to be operative beyond such value as the bankruptcy act attributes to it as evidence of the amount due as a provable claim in bankruptcy, and that execution on said judgment be stayed perpetually. *Barry v. New York Holding & Construction Co.* 308.

An attorney at law has no authority to bind his client by assenting to the discharge from arrest of a judgment debtor of the client without payment in full of the judgment, unless it was done with the personal knowledge and consent of the client as judgment creditor. *Hahn v. Loker*, 363.

Where an attorney at law acting for a judgment creditor assented, without authority to do so, to the release from arrest of the judgment debtor after he had been brought before a court and before any hearing had been had, it was said that it was not necessary to consider whether, if the judgment creditor had been bound by the act of his attorney, the release would have satisfied the judgment so that no action could be maintained upon it. *Ibid.*

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York but whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

JURISDICTION.

It is no ground for abatement of an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the plaintiff is a resident of another State and the defendant is a resident of Cambridge and the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, that this

Jurisdiction (*continued*).

trustee has no effects or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith. *Wright v. Graustein*, 68.

In the case stated above it was said that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected. *Ibid*.

A mail carrier, driving a horse attached to a mail wagon and engaged in distributing the United States mail on a public highway or on a public parkway, is subject to the rules and regulations made respectively by the street commissioners and the park commissioners requiring a traveller to drive on the right hand side of a road and in turning to the left into another street to pass to the right of and beyond the centre of the intersecting street before turning. *Commonwealth v. Closson*, 329.

In a suit by the administrator of the estate of a woman who died, having her domicile in this Commonwealth and leaving a will and property both in this Commonwealth and in the State of New York but whose will was not offered for probate in this Commonwealth but was proved in a Surrogate's Court in the State of New York, for alleged conversion of personal property belonging to the estate against the executor appointed in New York and against one who had received as legatee certain personal property in this Commonwealth from or by authority of such New York executor, it was held that under these circumstances it must be assumed that the Surrogate's Court found such facts to exist as authorized it under the law of New York to allow original proof of the will, and that as a matter of comity the judgment of that court must be recognized as conclusive, and accordingly that the actions for alleged conversions could not be maintained. *Morrison v. Hass*, 514.

In the case above described it was pointed out that St. 1909, c. 527, § 7, amending St. 1907, c. 563, § 16, and relating wholly to taxes on legacies and successions, had no application. *Ibid*.

In the same case it was said that, there having been no contention that R. L. c. 148, § 3, was applicable, it was not necessary to consider the construction of that statute. *Ibid*.

EQUITY JURISDICTION, see that title.

JURY AND JURORS.

Neither by constitutional provision nor by statute is a petitioner for a writ of mandamus given a right to trial by jury of issues of fact raised by the pleadings. *Casey v. Justice of the Superior Court*, 200.

It here was pointed out as manifest that an ordinary action of contract is a controversy concerning property, for which the right to a trial by jury is assured by art. 15 of the Declaration of Rights. *Farnham v. Lenox Motor Car Co.* 478.

The provision of Rule 31 of the Superior Court, relating to auditors, is not in conflict with the right to a trial by jury as guaranteed by art. 15 of the Declaration of Rights, and, where it appears that a trial by jury has been claimed seasonably by a party to an action and is insisted on by such party,

and where there is a real issue of fact to be tried, a cause is shown under the rule why judgment should not be entered on the auditor's report. *Farnham v. Lenox Motor Car Co.* 478.

Where the jury trial properly has been claimed and there is nothing to show that the party claiming it and opposing the auditor's report and the motion may not have evidence to controvert the auditor's findings, the court has no power to grant the motion. *Ibid.*

In the case in which the point above stated was decided, it was pointed out that assent to the appointment of an auditor or a failure to object to such a reference is not a waiver of a claim for a trial by jury which already has been filed seasonably. *Ibid.*

LABOR AND LABOR UNION.

In a suit in equity against the members of an unincorporated labor union to enjoin the defendants from interfering with the plaintiff carrying on his business in his own way, if the plaintiff shows that the combination of the defendants was for an illegal purpose declared in a rule, he is entitled to relief on showing that the defendants intend to enforce their declared purpose, and it is not necessary for him to go further and prove that the defendants threaten to enforce the purpose expressed in their rule by means which are illegal. *Haverhill Strand Theatre, Inc. v. Gillen*, 413.

The proprietor of a moving picture theatre, who wishes to employ a single musician to play the organ at all performances given there, can maintain a suit in equity against the members of a labor union of musicians to enjoin the defendants from enforcing against him a minimum rule adopted by the union, by which the plaintiff in order to employ any member of the union is required to employ an orchestra of not less than five musicians. *Ibid.*

A combination of the musicians in a city, by which a proprietor of a place of entertainment in the city in order to employ any member of the combination is compelled to employ a specified number of other members, is illegal as an unjustifiable interference with the right to such free flow of labor as every member of a community is entitled to for the purpose of carrying on the business which he has chosen to undertake. *Ibid.*

LACHES.

See that subtitle under EQUITY JURISDICTION.

LANDLORD AND TENANT.

Construction of Lease and Covenants.

A covenant in a lease of real estate, by which the lessee agrees to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments," binds the lessee to pay all taxes except betterments imposed upon the real estate but not taxes imposed upon the income in the form of rent accruing therefrom. *Codman v. American Piano Co.* 285.

Covenant relative to taxes in a lease of city real estate as to which, in an action by the lessors against the lessees on this covenant to recover the

Landlord and Tenant (continued).

amount of the normal federal income tax on the rent, which had been withheld by the lessees, it was held that the lessees were liable to pay to the plaintiffs the amount of the federal income tax imposed on the rent during the period described in the covenant, a phrase, "but not for any other taxes or excises in respect thereof," referring merely to income taxes retroactively levied beyond the express limitation of the covenant. *Kimball v. Cotting*, 541.

Under the provisions of a lease of an apartment that the lessee could terminate the lease by giving a certain notice in writing and, if the lessee continued occupancy (with consent of the lessor) of the granted premises, after the expiration of the lease, such occupancy at the lessor's option should constitute a renewal of the lease upon its terms and conditions, where the lessee gave the required notice in writing and then on the day set for termination of the tenancy, instead of vacating the premises, wrote a letter to the lessor in substance proposing to retain the apartment for another month as a tenant at will or at sufferance, agreeing to pay the rent for that month and to surrender the apartment at the end of it and continued his occupancy, and the lessor treated the lease as renewed, it was held that the lessor might maintain an action for rent under the lease after the lessee moved out. *Hildreth v. Adams*, 581.

Quiet Enjoyment.

Evidence offered at the trial of an action by the lessee under a lease in writing of a building containing a store and four family suites, against his lessor for an alleged eviction, which tended merely to show interference with the payment of rent by subtenants to the plaintiff, or their recognizing him as landlord, was held not to warrant a finding that the defendant had evicted the plaintiff, or had deprived him of the quiet enjoyment of the leased premises. *Aguglia v. Cavicchia*, 263.

Lessor's Rights as to Covenants in Sublease.

In a suit in equity by the assignee of the rights of the sublessor under a sublease in writing to the defendant of a store on the ground floor of a building which was leased to such sublessor by its owner, to enjoin the defendant from violating a covenant of the sublease by cutting an opening in the partition wall between the leased store and an adjoining store in the next building, where it appeared that the owner had given the defendant permission in writing to cut an opening in the partition wall for the purpose of connecting the two stores, it was held that the owner of the building had no power to authorize the defendant to violate the obligations of his covenant in the sublease from the plaintiff's assignor, and that the plaintiff was entitled to an injunction. *Essex Lunch, Inc. v. Boston Lunch Co.* 557.

Waiver of Covenants.

Requirement of a covenant in a lease of the third floor of a building, that an elevator should be used for freight purposes only, was held not to have been waived by reason of permission given by the janitor, where there was no evidence that the janitor had any authority to modify the provi-

sions of the lease and no evidence that the defendant had any knowledge of the violation of the covenant. *Follins v. Dill*, 321.

A custom not in existence when the lease above described was made is not admissible to show an abrogation of its requirements. *Ibid*.

Sublessor's Rights to enforce Covenants in Sublease against Permission given by Lessor.

In a suit in equity by the assignee of the rights of the sublessor under a sublease in writing to the defendant of a store on the ground floor of a building which was leased to such sublessor by its owner, to enjoin the defendant from violating a covenant of the sublease by cutting an opening in the partition wall between the leased store and an adjoining store in the next building, where it appeared that the owner had given the defendant permission in writing to cut an opening in the partition wall for the purpose of connecting the two stores, it was held that the owner of the building had no power to authorize the defendant to violate the obligations of his covenant in the sublease from the plaintiff's assignor, and that the plaintiff was entitled to an injunction. *Essex Lunch, Inc. v. Boston Lunch Co.* 557.

Tenancy at Will.

In an action by a physician against his landlord, to whom he owed rent, and a constable, to whom the landlord made a lease to terminate the plaintiff's tenancy at will, and a real estate agent, who obtained tenants for the defendant landlord, for an alleged unlawful conspiracy to injure the plaintiff by evicting him from the house in which he lived and had his office as a tenant at will of one of the defendants, it was held that there was no evidence for the jury that the defendants conspired to do any unlawful act or to do any lawful act by unlawful means. *DeWolfe v. Roberts*, 410.

In the above described case it was pointed out that the defendant landlord had a right to terminate the plaintiff's tenancy upon the advice and with the assistance of the other defendants, that the landlord's motive in exercising this right was immaterial and that it did not matter whether he terminated the tenancy because of ill will toward the plaintiff or merely because the plaintiff had failed to pay the rent that was due. *Ibid*.

In the case above described it also was held that questions addressed to the defendant landlord touching upon his motive for doing his lawful act were excluded properly as immaterial and having no tendency to prove the conspiracy alleged. *Ibid*.

Where the tenancy of a tenant at will paying rent by the month was terminated by a conveyance of the property by the landlord eleven days after the last rent day, the landlord in an action for use and occupation against his former tenant at will cannot recover any rent for the eleven days immediately preceding the termination of the tenancy, because no rent had accrued for that period. *Gavin v. Durden Coleman Lumber Co.* 576.

Tenancy at Sufferance.

Where the owner of land, which is occupied by a tenant at will, conveys it to another by a warranty deed, taking back a mortgage, and afterwards forecloses the mortgage and again acquires title to the land by a deed made

Landlord and Tenant (continued).

under a power in the mortgage, he has no claim for rent under R. L. c. 129, § 3, against his former tenant at will for a period during which, without notice or knowledge of the conveyance by the owner, the former tenant continued to occupy the land as a tenant at sufferance. *Gavin v. Durden Coleman Lumber Co.* 576.

Landlord's Liability for Injuries to Tenant or to his Invitee or Licensee.

The fact that a part of the plaster of the ceiling of the kitchen of a tenement fell on the tenant about two weeks after an unauthorized agent of the landlord had replastered the ceiling, if wholly unexplained, is no evidence of a defect in the plaster or of negligence or want of skill in laying it. *Wadleigh v. Bumford*, 122.

At the trial of an action of tort against the owner of an apartment house for personal injuries received by a florist's errand boy who fell down steps leading to the basement of the apartment which in darkness and rain he mistook for the entrance to the building whither he was going on an errand to a tenant of the defendant, it was held that the plaintiff's rights were no greater than those of the tenant; that the duty of the defendant to the tenant as to the basement steps was merely to use due care to keep them in the condition in which they were or purported to be at the time of the letting, and that, on the evidence, there was no evidence of a failure to perform that duty. *Pizzano v. Shuman*, 240.

In the above described action, it further was held that neither the fact that the defendant had a janitor on the premises who kept the hallways lighted, nor the fact that "there was a means of lighting that place [the basement steps] by night," was evidence tending to show that the defendant had assumed the obligation of lighting the steps. *Ibid.*

Where the owner of a building used as an apartment house has permitted a condition which amounts to a nuisance to exist with respect to steps leading from a public street to a basement of the building and, while the nuisance is in existence, lets an apartment to a tenant, retaining control of the steps, if thereafter a person going upon the premises upon business with that tenant is injured by reason of the nuisance, such person cannot recover from the owner. *Ibid.*

Person who, after leaving a bag for the collection of waste paper from the third floor of a building under a lease containing a provision that, "The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same," started to go down from the third floor by the freight elevator and, the elevator not being at that floor, fell down the well, sustaining injuries that caused his death, was held not entitled to greater rights than the lessee under whose implied invitation he came upon the premises, to have no right to use the freight elevator for his own transportation and at most to have been a licensee, so that his administrator could not recover for his conscious suffering and death in an action against the owner of the building. *Follins v. Dill*, 321.

Landlord's Liability for Nuisance.

Where the owner of a building used as an apartment house has permitted a condition which amounts to a nuisance to exist with respect to steps lead-

ing from a public street to a basement of the building and, while the nuisance is in existence, lets an apartment to a tenant, retaining control of the steps, if thereafter a person going upon the premises upon business with that tenant is injured by reason of the nuisance, such person cannot recover from the owner. *Pizzano v. Shuman*, 240.

Eviction.

Evidence offered at the trial of an action by the lessee under a lease in writing of a building containing a store and four family suites, against his lessor for an alleged eviction, which tended merely to show interference with the payment of rent by subtenants to the plaintiff, or their recognizing him as landlord, was held not to warrant a finding that the defendant had evicted the plaintiff, or had deprived him of the quiet enjoyment of the leased premises. *Aguglia v. Cavicchia*, 263.

LAW OF THE ROAD.

It was held that, at the trial of an action for personal injuries sustained in a collision of a motor car in which the plaintiff was travelling with another motor car driven by the defendant after the car in which the plaintiff was travelling had come from an intersecting road, under the circumstances it was right for the presiding judge to refuse to rule that, if the jury should find that the collision occurred some sixty-five feet or more from the intersection of two roads, the law of the road contained in R. L. c. 54 applied to the case and the provisions of St. 1909, c. 534, § 14, as amended, did not apply. *Rice v. Lowell Buick Co.* 53.

In the same case it was held that it also was right for the presiding judge to refuse to rule that, if the jury should find that the car which the plaintiff was driving was at the time of the collision substantially off the travelled part of the highway and was running on the street railway track, the plaintiff was not violating the law of the road. *Ibid.*

A mail carrier, driving a horse attached to a mail wagon and engaged in distributing the United States mail on a public highway or on a public parkway, is subject to the rules and regulations made respectively by the street commissioners and the park commissioners requiring a traveller to drive on the right hand side of a road and in turning to the left into another street to pass to the right of and beyond the centre of the intersecting street before turning. *Commonwealth v. Closson*, 329.

LEGACY.

See DEVISE AND LEGACY.

LETTER.

The depositing of a letter properly addressed with postage prepaid in the regular mail chute of an office building with directions for the return of the letter if not delivered printed on the envelope, and the fact that the letter was not returned, are *prima facie* evidence that the letter was re-

Letter (continued).

ceived, there being a presumption of fact that the post office officials and employees did their duty. *Tobin v. Taintor*, 174.

Under the provisions of St. 1908, c. 305, as to a notice in writing of the time, place and cause of the injury, which is made a condition precedent to recovery for injury from a defective condition of a building caused by or consisting in part of snow or ice, a proper notice in writing sent by mail to the owner of the building in control of it is a compliance with the statute. *Ibid.*

In an action for such injuries, evidence of the mailing of a letter containing such a notice by the plaintiff's attorney three days after the injury to the defendant at his business address in Boston, that on the corner of the envelop was printed a request to return the letter, if not delivered, to the address of the writer there stated and that the letter was not returned, was held to warrant a finding that the notice was sent and received. *Ibid.*

As evidence, see appropriate subtitle under EVIDENCE.

LIBEL AND SLANDER.

The words "Why would n't she have attractive gowns since two men are buying them for her" and "A C buys them for her as well as her husband," spoken orally concerning a married woman and A C, a married man, do not import adultery and are not actionable in themselves without the allegation and proof of special damage. *Craig v. Proctor*, 339.

Allegations in a declaration in an action of tort for slander brought for injury done the plaintiff by the speaking of words concerning his relations with a married woman not charging adultery, which were held to have been good as averments of special damage and to state a cause of action without stating the names of certain persons who were alleged to have severed their relations with the plaintiff by reason of the speaking of the words. *Ibid.*

In the case described above it was said that, if the defendant required greater certainty of averment for the purposes of defence to the action, he could file a motion for specifications and the trial judge could order the plaintiff to furnish the names of the persons referred to in his allegations of damage. *Ibid.*

In an action of tort for slander brought by the married woman concerning whom the words quoted above were alleged to have been spoken, the declaration alleged that the defendant intended falsely and maliciously to "charge the plaintiff with being a woman of immoral character;" and it was held that the allegations did not impute the commission of any criminal offence and consequently did not state a cause of action without allegations of special damage. *Ibid.*

In the same case it also was held that averments of loss of reputation, the alienation of friends who shunned her society, the suffering of mental anguish and of consequent physical illness were descriptive only of general and not of special damages. *Ibid.*

LICENSE.

Whether the formation, by several persons holding separate licenses from a town for the planting, growing and digging of oysters, of a partnership

whereby the partners carried on the business of oyster fishing under all the grants "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment of the licenses as, under R. L. c. 91, § 107, required the written consent of the selectmen of the town, so that under § 110 of that chapter, in default of such consent, the business might have been declared forfeited upon objection by the Commonwealth, was not decided in this case. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

If such an objection has not been raised and enforced by the Commonwealth, it cannot successfully be raised by the Boston, Cape Cod and New York Canal Company in a proceeding under St. 1899, c. 448, § 16, for the assessment of damages resulting to such a fishery by acts of the canal company in the construction of its canal. *Ibid.*

LIMITATIONS, STATUTE OF.

General.

In an action by a physician on an account annexed for charges for services rendered to the wife and minor child of the defendant, where the defendant had pleaded the statute of limitations and the plaintiff's claim was barred by the statute unless a certain payment of \$5 was a proper credit, evidence of a receipt of that amount by the plaintiff, without evidence that it came from the defendant, was held not to warrant a finding of an acknowledgment on the part of the defendant of an existing liability at the time of the alleged payment of \$5. *Vaughan v. Mansfield*, 352.

The statute of limitations will not begin to run to bar the rights of a beneficiary under a resulting trust as against the trustee until the trustee has repudiated the beneficiary's claim openly and notoriously. *Amory v. Amherst College*, 374.

Upon the evidence before a master to whom was referred a bill in equity to enforce a resulting trust in land which had been conveyed to a trustee upon trusts, part of which were invalid, and upon certain facts found by the master, it was held that the trustee to the knowledge of the beneficiary had repudiated the rights of the beneficiary about thirty-nine years before the beginning of the suit and had remained steadfast in that position, and therefore that the suit could not be maintained. *Ibid.*

As to a resulting trust arising under a similar deed, where the income, however, was not to be divided until 1928, it was held that the statute of limitations had not begun to run because the time had not yet arrived for the plaintiff to have possession. *Ibid.*

In the case of the resulting trust above described, the statute of limitations did not begin to run in favor of the trustee and against the beneficiary at the time of the delivery of the deed creating the trust. *Ibid.*

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, it appeared that the authority of the treasurer of the corporation was limited, and it was held that he had no authority to bind the corporation by his letters, accounts, statements or bookkeeping entries, so that evidence of that character should not have been admitted. *Ibid.*

Limitations, Statute of (*continued*).

In an action for a bonus which was to be paid to the plaintiff if he should succeed in improving a machine of the defendant by a patentable device, or if he at his option should invent and build a new patentable machine for the same purpose, where it appeared that more than six years before the date of the writ the plaintiff invented an improvement which was patented, and that he also invented an entirely new machine upon which he was at work when the improvement was patented and which was patented within six years before the date of the writ, it was held that it could not be ruled as matter of law that the plaintiff exercised his option by electing to earn the bonus of \$1,000 on the improvement when it was patented, and that it was for the jury to determine whether the plaintiff had decided upon the invention of the new machine as a fulfilment of his agreement, and that, if he had, his claim was not barred by the statute of limitations. *Hill v. Reece Button-hole Machine Co.* 544.

Special.

Further funds, collected by an administrator *de bonis non* with the will annexed of the estate of a testator upon an item entered in his inventory as a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will, were held not to be new assets within the meaning of R. L. c. 141, §§ 11, 18. *Shattuck v. Burrage*, 448.

In the same case it was said that it was unnecessary to determine in that case whether the words "new assets" as used in the statute included such equitable assets as a fund appointed by a debtor testator to persons other than his creditors by the exercise of a power of testamentary appointment. *Ibid.*

LORD'S DAY.

It is no ground for maintaining a suit in equity to set aside a judgment rendered against the plaintiff in an action at law by a court having jurisdiction of the parties and of the subject matter, that the promissory notes on which the judgment was obtained were executed on Sunday and that the plaintiff had an absolute defence to the action. *Joyce v. Thompson*, 106.

LOWELL.

Under the provision of the city charter of Lowell contained in St. 1911, c. 645, § 40, the treasurer and collector of taxes of that city can be removed from office by the municipal council only in the manner provided in the civil service law contained in St. 1904, c. 314, as amended by St. 1905, c. 243. *Stiles v. Municipal Council of Lowell*, 208.

A certain statement contained in a vote of the municipal council of Lowell purporting to remove the treasurer and collector of taxes of that city was held not to supply the want of a compliance with the provisions of the civil service law, where no notice of the proposed action ever was given and no copy was furnished to the person sought to be removed of any writing stating specifically the reasons of removal and no opportunity was afforded him to prepare and present his defence as required by St. 1904, c. 314, St. 1905, c. 243. *Ibid.*

The same was true in regard to a like vote passed under like circumstances purporting to remove the purchasing agent of Lowell. *Stiles v. Municipal Council of Lowell*, 208. .

In the case last mentioned it was pointed out that a letter of the city solicitor to the petitioner's counsel advising him of the nature of the evidence to be introduced at the hearing did not cure the failure to comply with the provisions of the statute, which requires specifications not from the city solicitor but from the municipal council. *Ibid.*

LYNN.

The public service commission, in making an apportionment of costs incurred by reason of the changes at Silsbee Street in Lynn under St. 1912, c. 492, § 15, in connection with the abolition of grade crossings of highways with the railroad, was substituted in place of the special commission provided for in St. 1906, c. 463, Part I, § 29. *Bay State Street Railway v. Public Service Commissioners*, 399.

Orders and rulings made by them in making such an apportionment were not orders and rulings made by them as a State board or commission. *Ibid.*

Such orders and rulings therefore are not reviewable by the Supreme Judicial Court under St. 1906, c. 463, Part III, § 157, or under St. 1913, c. 784, § 27. *Ibid.*

MAIL.

Carriers of United States mail are subject to reasonable regulations as to the use of public ways. *Commonwealth v. Closson*, 329.

MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

MANDAMUS.

Neither by constitutional provision nor by statute is a petitioner for a writ of mandamus given a right of trial by jury of issues of fact raised by the pleadings. *Casey v. Justice of the Superior Court*, 200.

It is within the discretionary power of a justice of this court in the matter of a petition for a writ of mandamus to allow a motion of the respondent to amend his answer. *Ibid.*

It being a criminal offence for a disbarred attorney to continue to practice law, a petition by him for a writ of mandamus to compel a justice of the Superior Court to recognize him as an attorney at law and as counsel for the plaintiff in a suit in equity called for hearing before the justice must be denied. *Ibid.*

While it would be proper, upon the hearing of a petition for a writ of mandamus commanding a justice of the Superior Court to recognize the petitioner as an attorney at law and counsel for the plaintiff in a suit pending for hearing before him, for the Attorney General to appear for the respondent, he is not required so to act, and it is proper for the respondent to be represented by members of the bar of the Commonwealth who hold no other official position in the Commonwealth. *Ibid.*

At the hearing by a single justice upon a petition for a writ of mandamus ad-

Mandamus (continued).

dressed to the municipal council of a city commanding the members of that council to reinstate the petitioner as an officer of the city, where the respondents have filed a plea in abatement and also have demurred to the petition and likewise have filed an answer, it is within the discretionary power of the single justice to order the respondents to elect whether they will proceed on the plea in abatement or on the demurrer or on the answer. *Stiles v. Municipal Council of Lowell*, 208.

Peremptory writs of mandamus were ordered to issue on petitions by the treasurer and collector of taxes and the purchasing agent of the city of Lowell, who alleged that they were removed from office contrary to the provisions of the civil service law. *Ibid.*

MARRIAGE AND DIVORCE.

The connivance which will constitute a bar to a libel for divorce need not be express connivance. It may be established by evidence which shows either active or passive consent on the part of the libellant to adulterous acts of the libellee. *Leavitt v. Leavitt*, 196.

Circumstantial evidence at the hearing of a libel for divorce brought by a husband and charging adultery, which was held to warrant the judge in drawing an inference that the libellant, deliberately throwing the libellee off her guard, gave her money intending to aid her in carrying out her purpose in going on her adulterous enterprise, and in ruling as a matter of law that the libellant was guilty of connivance and dismissing the libel. *Ibid.*

R. L. c. 151, § 37, in regard to proof of marriage, does not apply to records of foreign marriages. *Derinza's Case*, 435.

It seems that, in order that a certificate of a foreign marriage should be received in evidence, there must be proof either of a statute of the foreign State or nation requiring the record to be made or of some legal obligation or established practice requiring the keeping of the record or of some fact respecting the authenticity of the record of the effect of which the court can take judicial notice. *Ibid.*

A libel by a wife for divorce which alleged cruel and abusive treatment as the sole ground must be dismissed where the evidence showed only that the libellee's conduct caused his wife mental suffering and that she worried and became sick so that her health was impaired substantially by reason of her husband's conduct, but did not show that he did or said anything for the purpose of injuring her health. *Armstrong v. Armstrong*, 592.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

MILK.

The statute contained in R. L. c. 56, §§ 57, 62, as amended by St. 1910, c. 641, §§ 1, 2, relating to the sale of milk below standard, is not class legisla-

tion and does not violate any right secured by the Constitution of the United States. Following *St. John v. New York*, 201 U. S. 633. *Commonwealth v. Titcomb*, 14.

Nor is the statute described above in contravention of any provision of the Constitution of the Commonwealth. *Ibid*.

MINOR.

See INFANT.

MISTAKE.

Suit in equity to correct mistake in instrument in writing, see appropriate subtitle under EQUITY JURISDICTION.

MORTGAGE.

Of Real Estate.

Where the owner of land, which is occupied by a tenant at will, conveys it to another by warranty deed, taking back a mortgage, and afterwards forecloses the mortgage and again acquires title to the land by a deed made under a power in the mortgage, he has no claim for rent under R. L. c. 129, § 3, against his former tenant at will for a period during which, without notice or knowledge of the conveyance by the owner, the former tenant continued to occupy the land as a tenant at sufferance. *Gavin v. Durden Coleman Lumber Co.* 576.

By Executor.

In a suit in equity, by certain minors entitled to the remainders under a trust created by a will, to set aside a mortgage made by the former executors of the will, acting as trustees, to the defendants to secure the payment of indebtedness of the executors to the defendants for shoes sold to the executors while they were carrying on the retail shoe business of the testator after his death in the name of his estate, it was held that the mortgage must be set aside. *Donnelly v. Alden*, 109.

In the suit above described, it also was held that the defendants, knowing of the death of the testator, ought to have inspected the probate records, which would have shown them that the executors had no authority to conduct the business and would have led to the further discovery that the persons interested in the remainder were minors, and that a finding of the trial judge as to the actual state of mind of the defendants was immaterial. *Ibid*.

MOTOR VEHICLE.

If one driving a motor car leaves it standing in a public highway at any time between half an hour after sunset and half an hour before sunrise with all the lights extinguished and the engine at rest, he is operating the car unlawfully and may be convicted on a complaint under St. 1909, c. 534, § 7, as amended by St. 1915, c. 16, § 3. *Commonwealth v. Henry*, 19.

Whether the same offence would be committed after the car had been left in the highway an unreasonable time or if it had been abandoned there, were

Motor Vehicle (continued).

referred to as questions which it was not necessary to consider in the present case. *Commonwealth v. Henry*, 19.

It was held that, at the trial of an action for personal injuries sustained in a collision of a motor car in which the plaintiff was travelling with another motor car driven by the defendant after the car in which the plaintiff was travelling had come from an intersecting road, under the circumstances it was right for the presiding judge to refuse to rule that, if the jury should find that the collision occurred some sixty-five feet or more from the intersection of two roads, the law of the road contained in R. L. c. 54 applied to the case and the provisions of St. 1909, c. 534, § 14, as amended, did not apply. *Rice v. Lowell Buick Co.* 53.

Evidence in an action against the general manager of a corporation conducting ten lunch rooms by a traveller who was run into by a motor car owned by him which he had lent to the assistant manager of the same corporation, was held not to warrant a finding that the assistant manager was acting as the agent of the defendant in driving the car, both he and the defendant being servants and agents of the corporation in whose employ they acted in different capacities. *Santoro v. Bickford*, 357.

In the case above described testimony of the defendant that at the time of the accident the assistant manager was acting under his general direction and evidence that the assistant manager reported the accident to the defendant were held not to warrant a finding that the assistant manager was acting as the agent of the defendant in driving the car for the purpose of collecting the daily cash receipts of the corporation that employed him. *Ibid.*

See also that subtitle under NEGLIGENCE.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

Violation by the owner of real estate adjoining a public way of an ordinance requiring him to keep the sidewalk adjoining his house free from snow and ice would not render him liable for personal injuries caused to a traveller who slipped upon ice there in the absence of evidence that negligence of such owner caused it to be there. *Sanborn v. McKeagney*, 300.

Violation of ordinance as evidence of negligence, see appropriate subtitle under NEGLIGENCE.

Officers and Agents.

After the acceptance by a city of St. 1911, c. 468, every member of the police department of that city is subject to the civil service laws and the rules made thereunder whether he is the head of the police department or an ordinary patrolman. *Ellis v. Civil Service Commissioners*, 147.

Acts of the superintendent of streets of a town, which, as the owner of certain land owned as appurtenant to it an easement of the right to use a private way fifty feet wide and had brought a suit in equity for a mandatory injunction to compel the removal of a substantial brick wall built nineteen feet into such private way, and of a member of the board of selectmen having in charge the highway district that includes the right of way, which were held to be no defence to the suit, because these acts did not consti-

tute a license by the town to interfere with the easement owned by it, which could not be relinquished nor extinguished by an act of any town officer not authorized by the town. *Brookline v. Whidden*, 485.

In making a contract for the building of the Dorchester tunnel in the name of the city of Boston, the members of the Boston transit commission acted as public servants and not as servants or agents of the city. *McGovern v. Boston*, 394.

Superintendent of streets of a town in placing in the street catch basins and gratings without any vote of the town, for the purpose of diverting surface water from a public street into a culvert, was held to act as a public officer so that the town was not liable for damage caused by the overflowing of a brook, upon the land of a private owner caused thereby. *Blaisdell v. Stoneham*, 563.

Removal of officers, see subtitle, *post*.

Town Meeting.

Under the Constitution of the Commonwealth and the second amendment thereof the Legislature has no power to pass a general law enabling such towns as may adopt its provisions to substitute for the town meeting form of government, in which every qualified voter of the town may participate, a form wherein the town meeting shall consist of a certain percentage of the voters elected as town meeting members, so called, by the voters at large. *Opinion of the Justices*, 601.

Plan B Form of Government.

The adoption by the city of Cambridge of the Plan B form of government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of the city subject to the civil service laws. *Ellis v. Civil Service Commissioners*, 147.

Removal of Officers.

Under the provision of the city charter of Lowell contained in St. 1911, c. 645, § 40, the treasurer and collector of taxes of that city can be removed from office by the municipal council only in the manner provided in the civil service law contained in St. 1904, c. 314, as amended by St. 1905, c. 243. *Stiles v. Municipal Council of Lowell*, 208.

Peremptory writs of mandamus were ordered to issue on petitions by the treasurer and collector of taxes and the purchasing agent of the city of Lowell, who alleged that they were removed from office contrary to the provisions of the civil service law. *Ibid*.

Non-Liability for Acts of Public Officers.

City of Boston was held not to be liable either for negligence or wilful misconduct on the part of members of the Boston transit commission in procuring a contract for the construction of a part of Dorchester tunnel. *McGovern v. Boston*, 394.

Acquirement of Easement.

Where, twenty-seven years after the superintendent of streets of a town acting under Gen. Sts. c. 43, § 83, (now R. L. c. 48, § 99,) for the public safety and to protect the town from liability for injuries, placed a barrier across the entrance to a private way fifty feet wide, leading from a public street to a pond, which belonged, as an easement granted by deed, to the owner of certain land, the town acquired by purchase and conveyance the land to which the right of way was appurtenant, it was held that it acquired the right to use the private way over its full width for vehicles as well as for travellers on foot. *Brookline v. Whidden*, 485.

Main Drains and Surface Drainage.

See SEWER.

Defects in Ways.

Liability of municipalities for defects in highways, see appropriate subtitle under WAY.

MUNICIPAL COURT OF THE CITY OF BOSTON.

Under St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4, there is no limitation upon the kind of question of law which may come to this court by an appeal from an order of the Appellate Division of the Municipal Court of the City of Boston. *Wright v. Graustein*, 68.

In the case stated above it was said that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected. *Ibid*.

It is no ground for abatement of an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the plaintiff is a resident of another State and the defendant is a resident of Cambridge and the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, that this trustee has no effect or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith. *Ibid*.

In an action of contract on an account annexed for services rendered, brought in the Municipal Court of the City of Boston, after the case has been reported to the Appellate Division and an appeal from the order of the Appellate Division has been taken to this court, the defendant cannot in this court set up for the first time the defence that the plaintiff cannot recover on an account annexed because there was a special contract between the parties in regard to the plaintiff's services. *Dooley v. Murphy*, 72.

NEGLIGENCE.

Plaintiff's Due Care: Contributory Negligence.

Of a workman in a building under construction injured by a nail protruding from a ladder. *Fitzgerald v. Whidden*, 41.

Of the driver of motor vehicle turning into a street from an intersecting street. *Rice v. Lowell Buick Co.* 53.

Of the driver of a motor vehicle which he was testing on a much travelled way where street cars ran. *Nathan v. Boston Elevated Railway*, 62.

Before the enactment of St. 1914, c. 553, a painter, who was killed by a shock of electricity communicated to him from a ladder, which he was using and which was placed in obviously dangerous proximity to electric wires, was held as matter of law not to have been in the exercise of due care at the time of his injury. *Chartier v. Barre Wool Combing Co. Ltd.* 153.

Upon the evidence at the trial of an action for personal injuries sustained, after St. 1914, c. 553, went into effect, by a boy about ten years of age from being run down by a motor car driven by the defendant when the plaintiff was crossing a public square on foot, where the answer alleged that the plaintiff was not in the exercise of due care, it was held that the plaintiff had a right to go to the jury on the question of his due care. *Mullin v. Fallon*, 214.

An action of tort against a street railway company for personal injuries, received after St. 1914, c. 553, went into effect and resulting from the plaintiff being run into in the night time by a street car of the defendant as he was crossing a highway at a cross walk lighted by street lights, was tried on the footing of an action for injuries received before that statute went into effect, and it was held that on the evidence the question of the plaintiff's due care was for the jury. *Grant v. Boston Elevated Railway*, 219.

In an action, before the enactment of St. 1914, c. 553, against a street railway corporation by an administrator for causing the death of the plaintiff's intestate, the defendant cannot raise for the first time, at the argument before this court of its exception to the refusal of the presiding judge to order a verdict for it, the objection that the declaration contains no allegation that at the time of the injury that caused his death the intestate was in the exercise of due care. *Little v. Massachusetts Northeastern Street Railway*, 244.

Assumption of Risk.

See that subtitle under *Employer's Liability*, *post*.

Licenses or Trespasser.

Upon the evidence at the trial of an action against a railroad corporation for personal injuries sustained from being run into by a train of the defendant operated by electricity on a local branch line leading to the seashore, when the plaintiff was crossing or had crossed the parallel tracks of the defendant and was on or very near the track on which the train that struck him was running, it was held that there was evidence of negligence on the part of the defendant's engineer, but that there was no evidence of such misconduct, wilful, wanton, reckless or intentional as would make the defendant liable for the plaintiff's injuries if he was a trespasser or a mere licensee. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

In the case described above it was held that the evidence did not warrant a finding that the plaintiff, who at the time of his injury was crossing tracks at a station preparatory to entering an approaching train from the side away from the station, was a passenger, but that he was a trespasser or at

Negligence (continued).

most a mere licensee to whom the defendant owed no duty other than to refrain from wilfully, recklessly or wantonly exposing him to danger. *Doherty v. New York, New Haven & Hartford Railroad*, 135.

In the case above described it was said that the evidence of the use by persons of the outer space in getting upon trains on the farther track merely tended to show that the defendant had tolerated such a practice without taking measures to prevent it, and did not tend to show an invitation from the defendant to use that space. *Ibid.*

Invited Person.

In an action against a railroad corporation for personal injuries received when the plaintiff was run into by a train as he was crossing the tracks at a station to enter the train from the side of the track farthest from the station, it was said that the evidence of the use by persons of the outer space in getting upon trains on the farther track merely tended to show that the defendant had tolerated such a practice without taking measures to prevent it, and did not tend to show an invitation from the defendant to use that space. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

At the trial of an action of tort against the owner of an apartment house for personal injuries received by a florist's errand boy who fell down steps leading to the basement of the apartment which in darkness and rain he mistook for the entrance to the building whither he was going on an errand to a tenant of the defendant, it was held that the plaintiff's rights were no greater than those of the tenant; that the duty of the defendant to the tenant as to the basement steps was merely to use due care to keep them in the condition in which they were or purported to be at the time of the letting, and that, on the evidence, there was no evidence of a failure to perform that duty. *Pizzano v. Shuman*, 240.

Employer's Liability.

Election to accept benefits of workmen's compensation act.

In an action by an employee of a firm of masons against the members of a firm of teamsters for personal injuries alleged to have been sustained by reason of the negligence of a driver of the defendants, it was held that certain evidence as to treatment of the plaintiff at a hospital which his employer had selected under the workmen's compensation act for treatment of its employees would not warrant a finding that the plaintiff had elected to accept the benefits of the workmen's compensation act. *Wahlberg v. Bowen*, 335.

Indemnity fund maintained by employer.

Under R. L. c. 173, §§ 48, 121, a finding by a trial judge, that an action on a contract made by a corporation to indemnify its employees or their dependents out of a benefit fund for injuries sustained in the course of their employment or for death caused thereby was for the cause of action for which an action of tort against the same corporation for causing the alleged suffering and death of an employee by reason of the defendant's negligence was intended to be brought and was the cause of action relied on by the plaintiff when the action of tort was commenced, was held not as matter of

law to have been impossible. *Clark v. New England Telephone & Telegraph Co.* 1.

It therefore was held that the allowance by the trial judge of an amendment of such an action of tort into such an action of contract was warranted. *Ibid.*

In an action of contract by an administrator against the employer of the plaintiff's intestate upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it was no defence that the plaintiff brought an action of tort against another corporation for the injuries and death of the plaintiff's intestate in which he discharged and released the defendant, and consequently it was right for the trial judge to deny a motion of the defendant to be allowed to amend his answer by setting up such an alleged defence. *Ibid.*

Assumption of risk.

Workman ascending a ladder in a building in process of construction was held not to have assumed the risk of injury due to a nail negligently left protruding from a cleat of the ladder. *Fitzgerald v. Whidden*, 41.

Superintendence.

Evidence, at the trial of an action, brought before the passage of the workmen's compensation act, under R. L. c. 106, § 71, cl. 2, by a laborer against a building contractor for personal injuries sustained, when he was ascending a ladder, from having his arm strike an old nail that was protruding from the end of a cleat negligently left projecting, was held to warrant a finding that the superintendent was negligent in ordering the plaintiff to ascend the ladder without ascertaining the risk due to the projecting cleat and nail and giving him warning of the danger. *Fitzgerald v. Whidden*, 41.

In the same case it appeared that the protruding nail was on the under side of the cleat, and it was held that the presence of the nail was not so obvious nor so likely to be anticipated by a workman of the plaintiff's experience as to relieve the superintendent of his duty, if he allowed it to remain, to warn the workman of its presence. *Ibid.*

In the same case it was pointed out that as matter of law the plaintiff did not assume the risk of the superintendent's negligence. *Ibid.*

Dangerous, unsafe or incompetent fellow servants.

The duty resting on an employer to guard against the employment of incompetent servants is the same, whether the incompetence arises from ignorance of the work to be done and physical or mental incapacity to perform it on the one hand, or on the other hand from an unbalanced mind or self indulgent appetites and vices. *Dennis v. Clyde, New England & Southern Lines*, 502.

While such incompetence of an employee may be shown by evidence of a general reputation to that effect, evidence tending merely to show that an employee was addressed by a few of his fellow employees as "crazy" is not sufficient to warrant a finding of such a reputation. *Ibid.*

Evidence which, it was held, would not warrant a finding of such knowledge of the dangerous character of the workman as will render the employer

Negligence (*continued*).

liable in an action by the second fellow workman for personal injuries received by him when he afterwards was assaulted by the alleged dangerous workman. *Dennis v. Clyde, New England & Southern Lines*, 502.

General contractor.

The general contractor for the construction of a building, who himself was a mason and who had made a contract with a subcontractor for all the carpenter work of the building, by going to the building in process of construction after the mason work was completed for the purpose of seeing that the subcontractors performed their work in accordance with their contracts, did not make himself liable for an injury caused by the negligence of an employee of the subcontractor for the carpenter work. *Kettleman v. Atkins*, 89.

In an action against the general contractor for such injury, the plaintiff called the defendant as a witness, and on his direct examination he made a statement that all the persons who worked on the building did so under his direction, but, it being plain that he was referring to the subcontractors and not to the men in their employ, it was held that this was no evidence that he was responsible for the injury. *Ibid*.

Street Railway.

Passenger.

The unexplained fall of a window of a passenger car which is operated on a street and elevated railway is in itself no evidence that the window was unsafe or defective or that the servants of the corporation operating the car were negligent. Following *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254. *Murphy v. Boston Elevated Railway*, 38.

Therefore, a woman, who entered an electric car at an elevated terminal station and, finding all the windows of the car open, seated herself at one of the windows with her arm resting on the window sill and was injured, when the car had proceeded about two miles, by the window falling on her elbow, was held under the circumstances not to be entitled to maintain an action against the street railway corporation for her injuries. *Ibid*.

The customary existence in Boston at certain subway stations in the evening after the closing of the theatres of a large crowd of passengers, who push and jostle one another in trying to get their respective cars, but do not appear to be boisterous, disorderly or violent, even if it results in an injury to a passenger, is not evidence of negligence on the part of the corporation operating the street railway in the subway. *MacGiltray v. Boston Elevated Railway*, 65.

If in returning home in the evening after attending a theatre a woman gets into such a crowd and, as she is about to step over a space twelve or thirteen inches wide between the station platform and the step of the car, she is pushed or thrown down by some person from behind into the open space and thereby is injured, this is not evidence of negligence on the part of the corporation operating the car. *Ibid*.

The existence of a space of twelve or thirteen inches between a subway platform and a car operated in the subway which passengers are invited to enter is not evidence of negligence on the part of the operating corporation. *Ibid*.

Where a woman passenger before stepping from the platform of a subway sta-

tion to a car operated in the subway sees a space of twelve or thirteen inches between the platform and the step of the car and then is pushed into the space and injured, she cannot contend that her injury was caused by the failure of the operating corporation to warn her of the existence of the space which she noticed before her injury. *MacGillivray v. Boston Elevated Railway*, 65.

Person on highway.

Where, at the trial of an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate by reason of the carriage in which he was driving being overturned when the defendant's motorman, as the plaintiff alleged, sounded the whistle on his car as he was opposite the carriage and the horses were frightened, the motorman was available but was called by neither party, it was held that the judge properly left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call the motorman as a witness. *Little v. Massachusetts Northeastern Street Railway*, 244.

On the evidence at the trial of an action against a street railway corporation for personal injuries received when the plaintiff was run into by a street car of the defendant in the night time as he was crossing a highway at a cross walk lighted by street lights, it was held that findings were warranted that the plaintiff was in the exercise of due care and that the defendant's motorman was negligent. *Grant v. Boston Elevated Railway*, 219.

Elevated Railway.

In an action against a corporation operating an elevated railway for personal injuries sustained by stepping into an open space between a temporary station platform of the defendant and the step of a car forming part of a train of the defendant that was on tracks placed in a temporary location while extensive changes were being made in the arrangement of the station, it was held under the circumstances to be a question of fact on proper evidence, whether it was reasonable for the defendant, in the performance of the duty owed by it to its passengers, to provide guards or to give warning to persons about to enter the cars from the platform of the width of the space that they would have to step over. *Harrington v. Boston Elevated Railway*, 421.

In the same case it was held not to have been reversible error to exclude a question of a motorman in the defendant's employ, whether the defendant ran any trains of five cars between eleven and twelve o'clock at night, as it did not appear, and the defendant had made no offer to prove, that the witness's knowledge of the train operations of the defendant was so comprehensive as to make his testimony on that subject of any value. *Ibid*.

In the case above described the admission by the presiding judge of a question addressed to the plaintiff as a witness, whether as she was about to enter the car she was "in a position where" she "would have heard if anything had been said in regard to the space," was held not to be reversible error. *Ibid*.

In the same case it was held that the plaintiff properly was allowed to show by the defendant's engineer that the temporary location of the plaintiff's platform and tracks at that station, as they were for a period of eight weeks

Negligence (continued).

including the time of the plaintiff's injuries, was not approved by the railroad commission. *Harrington v. Boston Elevated Railway*, 421.

In the same case it was held that an expert engineer properly was permitted to testify that in his opinion the temporary platform in use at the time of the plaintiff's injuries was not a reasonably proper structure, this being a matter of engineering skill applied to complicated conditions and outside the range of common knowledge. *Ibid.*

In the same case evidence introduced by the plaintiff in rebuttal to contradict testimony introduced by the defendant to the effect that its expert did not know of any place where sliding platforms were used for a ten-inch space or for any space less than fifteen or sixteen inches, it was held, could not be said to be wholly incompetent. *Ibid.*

*Railroad.**Person crossing tracks.*

Evidence at the trial of an action against a railroad corporation for damage to the plaintiff's wagon and horses by reason of one of the plaintiff's horses catching one of his fore feet in a space between the planking and a rail of the defendant's track at a grade crossing of a highway which it was the duty of the defendant to maintain, was held to warrant a finding that the crossing was in a defective condition which rendered it unsafe for travellers and that such condition could have been discovered and remedied by the exercise of reasonable care and diligence on the part of the defendant. *Clapp v. New York, New Haven, & Hartford Railroad*, 532.

In the same case the plaintiff was allowed to go to the jury on the question whether the engineer was running the engine at an excessive and unreasonable rate of speed and it was held that it was a question for the jury whether the engineer saw the crossing tender who, when the plaintiff's horse fell, ran up the track to flag the train, or in the exercise of reasonable care ought to have seen him and have stopped his train in time to avoid the collision. *Ibid.*

It also was held that, upon all the evidence, this court could not say that there was not evidence from which the jury might have found that the train was running faster than was reasonable under the circumstances. *Ibid.*

In the same case it was held that evidence as to the height of the gates at the crossing and whether the engineer could have seen that they were raised was admissible in connection with other evidence upon the question, whether he was running the train at an unreasonable rate of speed as he approached the crossing. *Ibid.*

In the same case it was held that evidence as to the speed of the train was competent for the same purpose. *Ibid.*

Person at station.

Upon the evidence at the trial of an action against a railroad corporation for personal injuries sustained from being run into by a train of the defendant operated by electricity on a local branch line leading to the seashore, when the plaintiff was crossing or had crossed the parallel tracks of the defendant and was on or very near the track on which the train that struck him was running, it was held that there was evidence of negligence on the part of the defendant's engineer, but that there was no evidence of such misconduct,

wilful, wanton, reckless or intentional as would make the defendant liable for the plaintiff's injuries if he was a trespasser or a mere licensee. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

In the case described above it was held that the evidence did not warrant a finding that the plaintiff, who at the time of his injury was crossing tracks at a station preparatory to entering an approaching train from the side away from the station, was a passenger but that he was a trespasser or at most a mere licensee to whom the defendant owed no duty other than to refrain from wilfully, recklessly or wantonly exposing him to danger. *Ibid.*

Passenger.

Person crossing the tracks at a station for the purpose of entering a train from the side of the tracks farthest from the station was held under the circumstances not to be a passenger. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

Evidence at the trial of an action against a railroad corporation for personal injuries received by a passenger when, as she was leaving a car on a train of the defendant at a station, the door of the car closed upon her hand, was held not to warrant a finding of negligence of the defendant. *MacGill-Allen v. New York, New Haven, & Hartford Railroad*, 162.

At the trial above described, a question, asked by the plaintiff in cross-examination of the conductor of the train, as to how many brakemen the law required a railroad to have on the platform of its trains, properly was excluded. *Ibid.*

It also was proper to exclude at the same trial, where there was no evidence to show that the brakeman opened the door, a question asked the same conductor as to whether the brakeman "was . . . in the habit of fastening the door back, opening the door." *Ibid.*

Motor Vehicle.

It was held that, at the trial of an action for personal injuries sustained in a collision of a motor car in which the plaintiff was travelling with another motor car driven by the defendant after the car in which the plaintiff was travelling had come from an intersecting road, under the circumstances it was right for the presiding judge to refuse to rule that, if the jury should find that the collision occurred some sixty-five feet or more from the intersection of two roads, the law of the road contained in R. L. c. 54 applied to the case and the provisions of St. 1909, c. 534, § 14, as amended, did not apply. *Rice v. Lowell Buick Co.* 53.

Instructions to the jury in the same case that, while the driver of the plaintiff's car had violated the statute, the plaintiff was not necessarily precluded from recovery, that if a man was on a highway where he should not be, that would not authorize another to run him down and that it was a question for the jury to determine, whether such an emergency existed as to show that the driver of the plaintiff's car was using the care of a reasonably prudent and careful man in being where he was when the collision occurred, and that, if it was found that he was, he could not be held to have been negligent, was held to be an accurate statement of the law. *Ibid.*

In the same case it was held that it also was right for the presiding judge to refuse to rule that, if the jury should find that the car which the plaintiff was driving was at the time of the collision substantially off the travelled

Negligence (*continued*).

part of the highway and was running on the street railway track, the plaintiff was not violating the law of the road. *Rice v. Lowell Buick Co.* 53. Where, at the trial of an action against a street railway corporation for damage caused by a collision of a motor car of the plaintiff and an electric car of the defendant, the driver of the plaintiff's car had testified that he already was alert and was looking for electric cars, it was held not to have been reversible error to exclude testimony of the driver's companion that he warned the driver as they approached the place of danger. *Nathan v. Boston Elevated Railway*, 62.

In Use of Highway.

It was held that, at the trial of an action for personal injuries sustained in a collision of a motor car in which the plaintiff was travelling with another motor car driven by the defendant after the car in which the plaintiff was travelling had come from an intersecting road, under the circumstances it was right for the presiding judge to refuse to rule that, if the jury should find that the collision occurred some sixty-five feet or more from the intersection of the two roads, the law of the road contained in R. L. c. 54 applied to the case and the provisions of St. 1909, c. 534, § 14, as amended, did not apply. *Rice v. Lowell Buick Co.* 53.

In the same case it was held that it also was right for the presiding judge to refuse to rule that, if the jury should find that the car which the plaintiff was driving was at the time of the collision substantially off the travelled part of the highway and was running on the street railway track, the plaintiff was not violating the law of the road. *Ibid.*

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Upon the evidence at the trial of an action for personal injuries sustained, after St. 1914, c. 553, went into effect, by a boy about ten years of age from being run down by a motor car driven by the defendant when the plaintiff was crossing a public square on foot, where the answer alleged that the plaintiff was not in the exercise of due care, it was held that the plaintiff had a right to go to the jury on the question of his due care. *Mullin v. Fallon*, 214.

An action of tort against a street railway company for personal injuries, received after St. 1914, c. 553, went into effect and resulting from the plaintiff being run into in the night time by a street car of the defendant as he was crossing a highway at a cross walk lighted by street lights, was tried on the footing of an action for injuries received before that statute went into effect, and it was held that on the evidence the question of the plaintiff's due care was for the jury. *Grant v. Boston Elevated Railway*, 219.

At the same trial it was held that the evidence warranted a finding of negligence of the motorman. *Ibid.*

In Use of Electricity.

Before the enactment of St. 1914, c. 553, a painter, who was killed by a shock of electricity communicated to him from a ladder, which he was using and which was placed in obviously dangerous proximity to electric wires, was held as matter of law not to have been in the exercise of due care at the time of his injury. *Chartier v. Barre Wool Combing Co. Ltd.* 153.

In Use of Elevator.

Person, who, after leaving a bag for the collection of waste paper from the third floor of a building under a lease containing a provision that, "The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same," started to go down from the third floor by the freight elevator and, the elevator not being at that floor, fell down the well, sustaining injuries that caused his death, was held not entitled to greater rights than the lessee under whose implied invitation he came upon the premises, to have no right to use the freight elevator for his own transportation and at most to have been a licensee, so that his administrator could not recover for his conscious suffering and death in an action against the owner of the building. *Follins v. Dill*, 321.

Of One Controlling Real Estate.

Evidence at the trial of an action against the proprietor of a store by a customer for personal injuries sustained when the plaintiff caught her foot in a strip of matting was held not to warrant a finding of negligence on the part of the defendant, the condition of the matting before the accident being wholly a matter of conjecture. *Hathaway v. Chandler & Co. Inc.* 92.

In the case above described evidence that at a time after the accident another person fell over the same matting when it was in the same position that it was at the time of the accident was said to have been clearly inadmissible. *Ibid.*

The fact that a part of the plaster of the ceiling of the kitchen of a tenement fell on the tenant about two weeks after an unauthorized agent of the landlord had replastered the ceiling, if wholly unexplained, is no evidence of a defect in the plaster or of negligence or want of skill in laying it. *Wadleigh v. Bumford*, 122.

The presence on a sidewalk of a coal hole cover eight or nine inches from the uncovered hole is not in itself evidence of negligence on the part of the person controlling the building served by the coal hole. *Gunning v. King*, 177.

The mere facts that the iron cover of a coal hole in a sidewalk, that ordinarily

Negligence (continued).

- fitted in a rabbit and was held in position by its own weight and also was held in place by a weight fastened by a heavy wire to a ring in the bottom of the cover, was found at half past three o'clock in the morning on the sidewalk eight or nine inches away from the hole with nothing attached to it, in the absence of anything to show when, by whom or for what purpose the cover was removed, are not evidence of negligence on the part of the person in control of the building. *Gunning v. King*, 177.
- At the trial of an action of tort against the owner of an apartment house for personal injuries received by a florist's errand boy who fell down steps leading to the basement of the apartment which in darkness and rain he mistook for the entrance to the building whither he was going on an errand to a tenant of the defendant, it was held that the plaintiff's rights were no greater than those of the tenant; that the duty of the defendant to the tenant as to the basement steps was merely to use due care to keep them in the condition in which they were or purported to be at the time of the letting, and that, on the evidence, there was no evidence of a failure to perform that duty. *Pizzano v. Shuman*, 240.
- In the above described action, it further was held that neither the fact that the defendant had a janitor on the premises who kept the hallways lighted, nor the fact that "there was a means of lighting that place [the basement steps] by night," was evidence tending to show that the defendant had assumed the obligation of lighting the steps. *Ibid.*
- In the above described case, it also was held that, since it appeared that, when injured, the plaintiff had ceased to be a traveller upon the highway, a violation by the defendant as to the steps in question of an ordinance of the city where the building was, providing that "No person shall maintain an entrance to his estate by steps descending immediately from or near the line of a public street, unless the same is securely guarded," was not evidence of negligence of the defendant. *Ibid.*
- In an action for personal injuries sustained by falling on ice on the sidewalk in front of the house of the defendant that was formed from water flowing from a conductor, there was no evidence tending to show that the defendant controlled the conductor or that any water from his house drained into it, and it was held that there was no ground on which the defendant could be found to be liable. *Sanborn v. McKeagney*, 300.
- In the action above described there was no evidence of any ordinance requiring the defendant to keep the sidewalk adjoining his house free from snow and ice, but it was said, that, even if there had been such evidence, the defendant could not have been found to have been liable. *Ibid.*
- Other cases relating to the liability of the owner or of the person in control of a building for injuries resulting from a defective condition of the premises caused by or consisting in part of snow or ice, see SNOW AND ICE.
- Person who, after leaving a bag for the collection of waste paper from the lessee of the third floor of a building under a lease containing a provision that, "The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on the same," started to go down from the third floor by the freight elevator and, the elevator not being at that floor, fell down the well, sustaining injuries that caused his death, was held not entitled to greater rights than the lessee under whose implied invitation he came upon the premises, to have no right to use the freight

elevator for his own transportation and at most to have been a licensee, so that his administrator could not recover for his conscious suffering and death in an action against the owner of the building. *Follins v. Dill*, 321.

In the case above described, the requirement of the covenant that the elevator should be used for freight purposes only was held not to have been waived by reason of permission given by the janitor, where there was no evidence that the janitor had any authority to modify the provisions of the lease and no evidence that the defendant had any knowledge of the violation of the covenant. *Ibid.*

A custom not in existence when the lease above described was made is not admissible to show an abrogation of its requirements. *Ibid.*

In Maintenance of Store.

Evidence at the trial of an action against the proprietor of a store by a customer for personal injuries sustained when the plaintiff caught her foot in a strip of matting was held not to warrant a finding of negligence on the part of the defendant, the condition of the matting before the accident being wholly a matter of conjecture. *Hathaway v. Chandler & Co. Inc.* 92.

In the case above described evidence that at a time after the accident another person fell over the same matting when it was in the same position that it was at the time of the accident was said to have been clearly inadmissible. *Ibid.*

In Subway Station.

The customary existence in Boston at certain subway stations in the evening after the closing of the theatres of a large crowd of passengers, who push and jostle one another in trying to get their respective cars, but do not appear to be boisterous, disorderly or violent, even if it results in an injury to a passenger, is not evidence of negligence on the part of the corporation operating the street railway in the subway. *MacGilvray v. Boston Elevated Railway*, 65.

If in returning home in the evening after attending a theatre a woman gets into such a crowd and, as she is about to step over a space twelve or thirteen inches wide between the station platform and the step of the car, she is pushed or thrown down by some person from behind into the open space and thereby is injured, this is not evidence of negligence on the part of the corporation operating the car. *Ibid.*

The existence of a space of twelve or thirteen inches between a subway platform and a car operated in the subway which passengers are invited to enter is not evidence of negligence on the part of the operating corporation. *Ibid.*

Where a woman passenger before stepping from the platform of a subway station to a car operated in the subway sees a space of twelve or thirteen inches between the platform and the step of the car and then is pushed into the space and injured, she cannot contend that her injury was caused by the failure of the operating corporation to warn her of the existence of the space which she noticed before her injury. *Ibid.*

Of Gratuitous Bailees.

Where in the crowded lobby of a theatre a person was handed a box containing a pair of diamond earrings and was asked to examine and appraise them without reward and where as he was handling them he "dropped one of the earrings and it was lost," such person, who was only the gratuitous bailee of the earrings, cannot be held liable to their owner for the loss, there being no evidence to warrant a finding of gross negligence on his part. *Rubin v. Huhn*, 126.

Coal Hole.

The presence on a sidewalk of a coal hole cover eight or nine inches from the uncovered hole is not in itself evidence of negligence on the part of the person controlling the building served by the coal hole. *Gunning v. King*, 177.

The mere facts that the iron cover of a coal hole in a sidewalk, that ordinarily fitted in a rabbet and was held in position by its own weight and also was held in place by a weight fastened by a heavy wire to a ring in the bottom of the cover, was found at half past three o'clock in the morning on the sidewalk eight or nine inches away from the hole with nothing attached to it, in the absence of anything to show when, by whom or for what purpose the cover was removed, are not evidence of negligence on the part of the person in control of the building. *Ibid.*

In Blasting.

Circumstantial evidence at the trial of an action against a corporation that had been engaged in blasting for the construction of a sewer for alleged damage to the plaintiff's house by an explosion was held to warrant a finding that the explosion occurred in the sewer that was being constructed by the defendant and that the defendant was careless in doing the blasting. *Coffey v. West Roxbury Trap Rock Co.* 211.

In Building in Process of Construction.

Evidence, at the trial of an action, brought before the passage of the workmen's compensation act, under R. L. c. 106, § 71, cl. 2, by a laborer against a building contractor for personal injuries sustained, when he was ascending a ladder, from having his arm strike an old nail that was protruding from the end of a cleat negligently left projecting, was held to warrant a finding that the superintendent was negligent in ordering the plaintiff to ascend the ladder without ascertaining the risk due to the projecting cleat and nail and giving him warning of the danger. *Fitzgerald v. Whidden*, 41.

In the same case there was evidence on which it could be found that the plaintiff when injured was ascending the ladder in the ordinary manner, carrying a number of loose iron plates on his shoulder and unaware of the projecting cleat and nail until his left arm came in contact with them, and it was held that the question whether the plaintiff was in the exercise of due care was for the jury. *Ibid.*

In the same case it appeared that the protruding nail was on the under side of the cleat, and it was held that the presence of the nail was not so obvious

nor so likely to be anticipated by a workman of the plaintiff's experience as to relieve the superintendent of his duty, if he allowed it to remain, to warn the workman of its presence. *Fitzgerald v. Whidden*, 41.

Causing Death.

Under R. L. c. 173, §§ 48, 121, a finding by a trial judge, that an action on a contract made by a corporation to indemnify its employees or their dependents out of a benefit fund for injuries sustained in the course of their employment or for death caused thereby was for the cause of action for which an action of tort against the same corporation for causing the alleged suffering and death of an employee by reason of the defendant's negligence was intended to be brought and was the cause of action relied on by the plaintiff when the action of tort was commenced, was held not as matter of law to have been impossible. *Clark v. New England Telephone & Telegraph Co.* 1.

It therefore was held that the allowance by the trial judge of an amendment from such an action of tort into such an action of contract was not unwarranted. *Ibid.*

In the same action it was held that it was no defence that the plaintiff brought an action of tort against another corporation for the injuries and death of the plaintiff's intestate in which he discharged and released the defendant, and that consequently it was right for the trial judge to deny a motion of the defendant to be allowed to amend his answer by setting up such an alleged defence. *Ibid.*

Before the enactment of St. 1914, c. 553, a painter, who was killed by a shock of electricity communicated to him from a ladder, which he was using and which was placed in obviously dangerous proximity to electric wires, was held as matter of law not to have been in the exercise of due care at the time of his injury. *Chartier v. Barre Wool Combing Co. Ltd.* 153.

In an action, before the enactment of St. 1914, c. 553, against a street railway corporation by an administrator for causing the death of the plaintiff's intestate, the defendant cannot raise for the first time, at the argument before this court of its exception to the refusal of the presiding judge to order a verdict for it, the objection that the declaration contains no allegation that at the time of the injury that caused his death the intestate was in the exercise of due care. *Little v. Massachusetts Northeastern Street Railway*, 244.

In an action by an administrator for causing the death of the plaintiff's intestate by an injury due to the negligence of a servant of the defendant, if it appears that by reason of the negligence of the defendant's servant the plaintiff's intestate sustained an injury to his kidneys that was the immediate cause of his death which was hastened thereby from one to two years, a finding is warranted that the injury was the proximate cause of his death. *Ibid.*

Release executed by one, who had suffered an injury by reason of the negligence of a street railway corporation, was held, in case of the subsequent death of the injured person, not to bar an action brought by the executor of his will under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, c. 392, § 1; 1911, c. 635; 1912, c. 354, to enforce the penalty for causing his

Negligence (*continued*).

death by the negligent act that caused the injury specified in the release.
Wall v. Massachusetts Northeastern Street Railway, 506.

General, Independent Contractor.

The general contractor for the construction of a building, who himself was a mason and who had made a contract with a subcontractor for all the carpenter work of the building, by going to the building in process of construction after the mason work was completed for the purpose of seeing that the subcontractors performed their work in accordance with their contracts, did not make himself liable for an injury caused by the negligence of an employee of the subcontractor for the carpenter work. *Kettleman v. Atkins*, 89.

In an action against the general contractor for such injury, the plaintiff called the defendant as a witness, and he on his direct examination made a statement that all the persons who worked on the building did so under his direction, but, it being plain that he was referring to the subcontractors and not to the men in their employ, it was held that this was no evidence that he was responsible for the injury. *Ibid.*

Resulting in Misstatements as Basis of Contract.

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which the work to be done in constructing a part of Dorchester tunnel were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract. *McGovern v. Boston*, 394.

Violation of Ordinance or By-law.

In an action by a florist's boy for injuries caused by his falling down steps which began half an inch from the line of a public way and which he mistook for the entrance to a building, it was held that, since it appeared that, when injured, the plaintiff had ceased to be a traveller upon the highway, a violation by the defendant as to the steps in question of an ordinance of the city where the building was, providing that "No person shall maintain an entrance to his estate by steps descending immediately from or near the line of a public street, unless the same is securely guarded," was not evidence of negligence of the defendant. *Pizzano v. Shuman*, 240.

Violation by the owner of real estate adjoining a public way of an ordinance requiring him to keep the sidewalk adjoining his house free from snow and ice would not render him liable for personal injuries caused to a traveller who slipped upon ice there in the absence of evidence that negligence of such owner caused it to be there. *Sanborn v. McKeagney*, 300.

Res ipsa loquitur.

The unexplained fall of a window of a passenger car which is operated on a street and elevated railway is in itself no evidence that the window was unsafe or defective or that the servants of the corporation operating the

car were negligent. Following *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254. *Murphy v. Boston Elevated Railway*, 38.

The fact that a part of the plaster of the ceiling of the kitchen of a tenement fell on the tenant about two weeks after an authorized agent of the landlord had replastered the ceiling, if wholly unexplained, is no evidence of a defect in the plaster or of negligence or want of skill in laying it. *Wadleigh v. Bumford*, 122.

The presence on a sidewalk of a coal hole cover eight or nine inches from the uncovered hole is not in itself evidence of negligence on the part of the person controlling the building served by the coal hole. *Gunning v. King*, 177.

Proximate Cause.

See that title.

NEWSPAPER.

A statement in an editorial published in a newspaper, that the owner of the paper for years had guaranteed every advertisement in its columns to be honest and trustworthy and that the "publishers guarantee the integrity of its advertising," indicates no more than that the advertisers in the paper can be depended upon as trustworthy and honest, and it does not guarantee the faithful performance of the contracts made by the advertisers nor agree to answer for their debt or default. *Heathcote v. Curtis Publishing Co.* 569.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

Notice by a judgment debtor that he desired to take the oath for the relief of poor debtors, which was held under the circumstances not to have been served by a constable upon the creditor by leaving it at his last and usual place of abode on the ground floor of a three apartment house and not to satisfy the requirements of R. L. c. 168, § 34. *David v. Lennon*, 160.

Under the provisions of St. 1906, c. 305, as to a notice in writing of the time, place and cause of the injury, which is made a condition precedent to recovery for injury from a defective condition of a building caused by or consisting in part of snow or ice, a proper notice in writing sent by mail to the owner of the building in control of it is a compliance with the statute. *Tobin v. Taintor*, 174.

In an action for such injuries, evidence of the mailing of a letter containing such a notice by the plaintiff's attorney three days after the injury to the defendant at his business address in Boston, that on the corner of the envelope was printed a request to return the letter, if not delivered, to the address of the writer there stated and that the letter was not returned was held to warrant a finding that the notice was sent and received. *Ibid.*

Other cases relating to notice of injuries resulting from snow and ice, see SNOW AND ICE.

Persons selling goods to executors continuing the business of the testator

Notice (*continued*).

are fixed with notice of the limitations in the power and authority of the executors. *Donnelly v. Alden*, 109.

A provision in a contract in writing between the owner of a horse and a railroad corporation for the transportation of the horse, which made a condition precedent to the enforcement of a claim for damages the giving of a certain five days' notice in writing, was held not to be unreasonable and to be valid. *Fletcher v. New York Central & Hudson River Railroad*, 258.

What notice is required to be given by a party appealing from a decree of the Probate Court. *O'Neill v. O'Neill*, 508.

NUISANCE.

Where the owner of a building used as an apartment house has permitted a condition which amounts to a nuisance to exist with respect to steps leading from a public street to a basement of the building and, while the nuisance is in existence, lets an apartment to a tenant, retaining control of the steps, if thereafter a person going upon the premises upon business with that tenant is injured by reason of the nuisance, such person cannot recover from the owner. *Pizzano v. Shuman*, 240.

OFFICER.

Notice by a judgment debtor that he desired to take the oath for the relief of poor debtors, which was held under the circumstances not to have been served by a constable upon the creditor by leaving it at his last and usual place of abode on the ground floor of a three apartment house and not to satisfy the requirements of R. L. c. 168, § 34. *David v. Lennon*, 160.

PUBLIC OFFICER, see that title.

OVERSEERS OF THE POOR.

Rights of overseers of the poor as to bastardy proceedings, see **BASTARDY**.

OYSTER FISHERY.

Whether the formation, by several persons holding separate licenses from a town for the planting, growing and digging of oysters, of a partnership whereby the partners carried on the business of oyster fishing under all the grants "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment of the licenses as, under R. L. c. 91, § 107, required the written consent of the selectmen of the town, so that under § 110 of that chapter, in default of such consent, the business might have been declared forfeited upon objection by the Commonwealth, was not decided in this case. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

If such an objection has not been raised and enforced by the Commonwealth, it cannot successfully be raised by the Boston, Cape Cod and New York Canal Company in a proceeding under St. 1899, c. 488, § 16, for the assessment of damages resulting to such a fishery by acts of the canal company in the construction of its canal. *Ibid*.

Damages to which the owners or licensees of oyster fisheries injured by the

Boston, Cape Cod and New York Canal Company in the construction of its canal are entitled under St. 1899, c. 448, § 16. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

PARENT AND CHILD.

In an action to recover the price of hats and veils furnished to infant daughters of the defendant to wear at the funeral of their mother, if it appears "that the defendant neither expressly nor impliedly authorized the purchase of the goods," but it appears that he permitted his minor daughters to use the articles, which were purchased by them from the plaintiff with his knowledge, and that he afterwards offered to pay a certain price for the articles, which his daughters asserted was the agreed price, it can be found that he adopted and ratified the purchase. *Bisbee v. McManus*, 124.

In the same case it appeared that the defendant was a workman earning \$18 a week, and it was held that it could be ruled as matter of law that the four hats and two veils furnished to the defendant's four minor daughters for the total price of \$14 to wear to their mother's funeral were not in the class of necessities. *Ibid.*

Under R. L. c. 81, § 10, and St. 1909, c. 504, § 82, the Treasurer and Receiver General may recover in an action against a father, living in this Commonwealth and of sufficient ability, for the support in a State hospital for the insane of his daughter, who at the time of her committal was more than twenty-one years of age and was married to a man then living in this Commonwealth and continuing to reside here. *Treasurer & Receiver General v. Sermini*, 248.

In such an action the erroneous admission, subject to the defendant's exception, of evidence offered and introduced by the plaintiff, that the husband of the insane person was not of sufficient ability to pay for her support, does not harm the defendant, as he would have been none the less liable if it had appeared that the husband of his daughter was of sufficient ability to support her. *Ibid.*

It also was said that, although the Treasurer and Receiver General was not bound to resort to his remedy against the husband if of sufficient ability to support his wife, he was at liberty to do so. *Ibid.*

Bastardy Proceedings, see BASTARDY.

PARTITION.

Under the provisions of a will giving to two nieces of the testatrix a life interest in a homestead, it was held that one to whom one of the nieces, who had ceased to occupy the property, had conveyed her interest could not maintain a petition for partition against the other niece, who continued to live in the homestead, because the right to use the house was not transferable, it having been the intention of the testatrix that the possession of the house should not be interfered with as long as either of her nieces wished to use it. *Towle v. Wingate*, 566.

PARTNERSHIP.

The mere fact, that two persons held themselves out as partners doing business as real estate brokers and could be considered such by their creditors, is

Partnership (*continued*).

not a bar to an action brought by one of them for a commission as broker, if it does not also appear that by agreement between themselves they were partners. *Wheelock v. Zevias*, 167.

Where the evidence as to such an agreement is conflicting, the question of its existence is for the jury. *Ibid*.

Whether the formation, by several persons holding separate licenses from a town for the planting, growing and digging of oysters, of a partnership whereby the partners carried on the business of oyster fishing under all the grants "jointly and as partners and kept no separate account of the oysters on the different grants" was such an assignment of the licenses as, under R. L. c. 91, § 107, required the written consent of the selectmen of the town, so that under § 110 of that chapter, in default of such consent, the business might have been declared forfeited upon objection by the Commonwealth, was not decided in this case. *Boston, Cape Cod & New York Canal Co. v. Henshaw*, 185.

PASSENGER.

Actions for personal injuries suffered by passengers, see appropriate subtitles under CARRIER and NEGLIGENCE.

PAUPER.

The provision contained in R. L. c. 80, § 6, (repealed by St. 1911, c. 669, § 7,) that "A person who is absent from the Commonwealth for ten consecutive years shall lose his settlement," does not apply to the derivative settlement of a wife, which she acquired by marrying a man then having a settlement in this Commonwealth which he afterwards lost by leaving the Commonwealth and remaining continuously absent for ten years thereafter while his wife continued to live in this Commonwealth without acquiring any other settlement. *Treasurer & Receiver General v. Boston*, 83.

Under R. L. c. 81, § 10, and St. 1909, c. 504, § 82, the Treasurer and Receiver General may recover in an action against a father, living in this Commonwealth and of sufficient ability, for the support in a State hospital for the insane of his daughter, who at the time of her committal was more than twenty-one years of age and was married to a man then living in this Commonwealth and continuing to reside here. *Treasurer & Receiver General v. Sermini*, 248.

In such an action the erroneous admission, subject to the defendant's exception, of evidence, offered and introduced by the plaintiff, that the husband of the insane person was not of sufficient ability to pay for her support, does not harm the defendant, as he would have been none the less liable if it had appeared that the husband of his daughter was of sufficient ability to support her. *Ibid*.

It also was said that, although the Treasurer and Receiver General was not bound to resort to his remedy against the husband if of sufficient ability to support his wife, he was at liberty to do so. *Ibid*.

PAYMENT.

In an action by a physician on an account annexed for charges for services rendered to the wife and minor child of the defendant, where the defendant

had pleaded the statute of limitations and the plaintiff's claim was barred by the statute unless a certain payment of \$5 was a proper credit, evidence of a receipt of that amount by the plaintiff, without evidence that it came from the defendant, was held not to warrant a finding of an acknowledgment on the part of the defendant of an existing liability at the time of the alleged payment of \$5. *Vaughan v. Mansfield*, 352.

A voluntary payment of a debt to an executor of the will of the creditor appointed in another State by the law of which he is authorized to receive it is valid. *Morrison v. Berkshire Loan & Trust Co.* 519.

Payment of a debt by a trust company in this Commonwealth to the New York executor under such circumstances without invoking the protection of our courts was held to have been valid. *Ibid.*

In the same case it was said that R. L. c. 148, § 3, not having been relied upon by the plaintiff nor referred to by him as applicable, need not be considered. *Ibid.*

In the same case it was pointed out St. 1909, c. 527, § 7, had no application to the action. *Ibid.*

PERPETUITIES, RULE AGAINST.

Requirement in a deed of certain real estate to a college corporation in trust to use the income for the increase and benefit of a literary and benevolent fund of the college, previously established by the donor, that one half of the income of the fund should be paid over to the grantor "or his nearest heir" of his name "for the time being, who shall demand it" was held to be void because in violation of the rule against perpetuities. *Amory v. Amherst College*, 374.

PHYSICIANS AND SURGEONS.

Requirement of the workmen's compensation act contained in St. 1914, c. 708, § 1, that for the first two weeks after an injury to an employee the insurer "shall furnish reasonable medical and hospital services." *Ripley's Case*, 302.

In a case under the workmen's compensation act, evidence as to whether an employer had furnished "reasonable medical and hospital services" under St. 1914, c. 708, § 1, although it would have supported a finding by inference that arrangements for the treatment of employees at a hospital had been made, did not require such an inference as matter of law, so that a finding by the Industrial Accident Board that there was no evidence that any arrangements had been made to furnish treatment was warranted. *Ibid.*

PLEADING, CIVIL.

Plea in Abatement.

In an action by the Treasurer and Receiver General for support of a pauper, which properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither lived nor had his usual place of business in that county, it was said that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise

Pleading, Civil (*continued*).

the objection either by a plea or answer in abatement or by a motion to dismiss. *Treasurer & Receiver General v. Sermini*, 248.
See also that subtitle under PRACTICE, CIVIL.

Declaration.

Where the declaration in an action of contract in the Municipal Court of the City of Boston was "for money paid for the use of and on and for the account of the defendant," and the proof was of money paid by the plaintiff at the defendant's request, if the fact, that the declaration did not allege that the money was paid at the defendant's request, was not called to the judge's attention, it is too late to rely on this defect in this court upon an appeal from a dismissal by the Appellate Division of a report of a finding for the plaintiff. *Serabian v. Tatian*, 191.

Averments, in a count of a declaration by a lessee against the lessor, of unlawful interference by a lessor with subtenants of the lessee and preventing them from paying rent to the lessee, were held to be matters of inducement merely introductory to an allegation of ouster or eviction, which was the essential subject of the count on which the plaintiff relied, so that it was not necessary to consider whether the facts contained in an offer of proof by the plaintiff would have supported a count for unlawful interference with the plaintiff's rights under the contract contained in the lease. *Aguglia v. Caviocchia*, 263.

Specifications.

Defendant in an action of tort for slander was held not to have been entitled to have a demurrer to the declaration sustained by reason of a failure to state certain names which he might have obtained upon a motion for specifications. *Craig v. Proctor*, 339.

Motion to dismiss.

In an action by the Treasurer and Receiver General for support of a pauper, which properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither lived nor had his usual place of business in that county, it was said that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise the objection either by a plea or answer in abatement or by a motion to dismiss. *Treasurer & Receiver General v. Sermini*, 248.

POLICE.

The adoption by the city of Cambridge of the Plan B form of government under St. 1915, c. 267, did not repeal nor cancel the effect of the previous acceptance by that city of St. 1911, c. 468, which made the head of the police department of that city subject to the civil service laws. *Ellis v. Civil Service Commissioners*, 147.

After the acceptance by a city of St. 1911, c. 468, every member of the police department of that city is subject to the civil service laws and the rules made thereunder whether he is the head of the police department or an ordinary patrolman. *Ibid*.

POOR DEBTOR.

Notice by a judgment debtor that he desired to take the oath for the relief of poor debtors, which was held under the circumstances not to have been served by a constable upon the creditor by leaving it at his last and usual place of abode on the ground floor of a three apartment house and not to satisfy the requirements of R. L. c. 168, § 34. *David v. Lennon*, 160.

POWER.

A power given by will to a beneficiary for life, to dispose by his will of property of the testator, gives the donee of the power no interest at law in the property over which he has the power of testamentary appointment and upon his death such property constitutes no part of his estate. *Shattuck v. Burrage*, 448.

Equity, however, will enforce the equitable duty of such a donee of a power to exercise the power for the purpose of paying his debts before he gives away the property to other persons. *Ibid.*

The creditors of such a deceased donee of a power thus acquire immediately upon his death the equitable right to enforce their claims against the property over which he has exercised the power of appointment. *Ibid.*

In the case above described the testator in his will made use of the common phrase directing the payment of his just debts, and it was pointed out that the use of this ancient and common form could not be regarded as an exercise of the power of appointment by the testator, it being nothing more than an expression of the obligation imposed by law. *Ibid.*

Further funds, collected by an administrator *de bonis non* with the will annexed of the estate of a testator upon an item entered in his inventory as a "claim" of uncertain value, consisting of a suit to recover a fund maladministered by the executor of the will of the testator's mother, of which by his will the testator had made an appointment under a power given him by his mother's will, were held not to be new assets within the meaning of R. L. c. 141, §§ 11, 18. *Ibid.*

In a case to which the provisions of St. 1909, c. 527, § 8, do not apply, where a testator, who left debts exceeding by a large sum the amount of his own property, exercised by his will a general power of appointment given him by the will of his father, appointing the principal of a trust fund to certain persons named, a legacy and succession tax under St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1, cannot be levied on the amount of the entire fund appointed but only on the balance of that fund which actually goes to the appointees after the payment of the debts of the testator. *Hill v. Treasurer & Receiver General*, 474.

POWER OF ATTORNEY.

Where a husband, before obtaining a divorce from his wife for desertion, made use of a power of attorney, given to him by her before she left her home, to convey her real estate through a third person to himself, it was held that the wife could maintain a suit in equity against her former husband to set aside the conveyance, the authority given by the power of

attorney being restricted necessarily and designed for the benefit of the owner of the real estate and conferring on the husband no right to convey the property to himself for his own advantage to the detriment of the owner. *English v. English*, 11.

PRACTICE, CIVIL.

Venue.

See that title.

Abatement.

A motion by a plaintiff in an action at law "to overrule" an answer in abatement filed by the defendant is irregular. The proper procedure is to have the case set down for hearing on the answer in abatement. *Wright v. Graustein*, 68.

On a hearing upon an answer in abatement, where the plaintiff does not admit the facts stated in such answer, the defendant must prove the allegations in the ordinary way, and it is error for a trial judge to sustain an answer in abatement upon a mere offer of proof by the defendant, treating it as the equivalent of evidence. *Ibid.*

It is no ground for abatement of an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the plaintiff is a resident of another State and the defendant is a resident of Cambridge and the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, that this trustee has no effects or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith. *Ibid.*

In the case stated above it was said that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected. *Ibid.*

At the hearing by a single justice upon a petition for a writ of mandamus addressed to the municipal council of a city commanding the members of that council to reinstate the petitioner as an officer of the city, where the respondents have filed a plea in abatement and also have demurred to the petition and likewise have filed an answer, it is within the discretionary power of the single justice to order the respondents to elect whether they will proceed on the plea in abatement or on the demurrer or on the answer. *Stiles v. Municipal Council of Lowell*, 208.

Parties.

The mere fact, that two persons held themselves out as partners doing business as real estate brokers and could be considered such by their creditors, is not a bar to an action brought by one of them for a commission as broker, if it does not also appear that by agreement between themselves they were partners. *Wheelock v. Zevitas*, 167.

Amendment.

Under R. L. c. 173, §§ 48, 121, a finding by a trial judge, that an action on a contract made by a corporation to indemnify its employees or their dependents out of a benefit fund for injuries sustained in the course of their employment or for death caused thereby was for the cause of action for which an action of tort against the same corporation for causing the alleged suffering and death of an employee by reason of the defendant's negligence was intended to be brought and was the cause of action relied on by the plaintiff when the action of tort was commenced, was held not as matter of law to have been impossible. *Clark v. New England Telephone & Telegraph Co.* 1.

It therefore was held that the allowance by the trial judge of an amendment from such an action of tort into such an action of contract was not unwarranted. *Ibid.*

It was held to have been proper for the judge to deny a motion to amend the answer in the action of contract above described by setting up a discharge and release of a corporation which was a joint tortfeasor with the defendant in the action of contract and was the defendant in an action of tort brought by the plaintiff for the same injuries and death. *Ibid.*

It is within the discretionary power of a justice of this court in the matter of a petition for a writ of mandamus to allow a motion of the respondent to amend his answer. *Casey v. Justice of the Superior Court*, 200.

A trial judge has power to order the correction of the docket record by the entering *nunc pro tunc* of an order previously made by the court, which through inadvertence had not been entered on the docket by the clerk. *Follins v. Dill*, 321.

Amendment of Docket Entry.

A trial judge has power to order the correction of the docket record by the entering *nunc pro tunc* of an order previously made by the court, which through inadvertence had not been entered on the docket by the clerk. *Follins v. Dill*, 321.

Prematurity of Action.

At the trial of an action in the Municipal Court of the City of Boston to recover sums of money paid by the plaintiff at the defendant's request to take up a promissory note, where the evidence showed that the full payment of the note was not completed until six days after the date of the writ but the defendant did not bring this to the attention of the trial judge who found for the plaintiff, it is too late to rely on such a defence in this court upon an appeal from a dismissal by the Appellate Division of a report by the trial judge. *Serabian v. Tatian*, 191.

It appeared that an action was upon a right of recovery which was alleged to have vested in the plaintiff on a certain day, but that a foreclosure sale at which the defendant was to perform his agreement did not occur until sixteen days later, but, this contention not having been raised by the defendant either in the pleadings or at the trial and no exception having been taken, it was held that under the circumstances it was not open to the defendant in this court. *Rosenberg v. Drooker*, 205.

Election.

Where the declaration in an action of contract by a real estate broker contains two counts, the first upon an account annexed for certain specific commissions and the second upon a *quantum meruit* for the value of services rendered as a real estate broker under a special contract which conduct of the defendant prevented him from performing, the plaintiff need not be required to elect between the counts but may be permitted to go to the jury upon both of them. *Wheelock v. Zevitas*, 167.

At the hearing by a single justice upon a petition for a writ of mandamus addressed to the municipal council of a city commanding the members of that council to reinstate the petitioner as an officer of the city, where the respondents have filed a plea in abatement and also have demurred to the petition and likewise have filed an answer, it is within the discretionary power of the single justice to order the respondents to elect whether they will proceed on the plea in abatement or on the demurrer or on the answer. *Stiles v. Municipal Council of Lowell*, 208.

Deposition.

In proceedings under the workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Order nunc pro tunc.

A trial judge has power to order the correction of the docket record by the entering *nunc pro tunc* of an order previously made by the court, which through inadvertence had not been entered on the docket by the clerk. *Follins v. Dill*, 321.

If a commission to take a deposition of a witness in a foreign country in proceedings under the workmen's compensation act is issued through inadvertence when by mistake or oversight no written request has been filed, the defect can be cured by the filing of a written request by the Industrial Accident Board or some member of it and the allowance of that request by the Superior Court by a *nunc pro tunc* order. *Derinza's Case*, 435.

Jury.

Neither by constitutional provision nor by statute is a petitioner for a writ of mandamus given a right to trial by jury of issues of fact raised by the pleadings. *Casey v. Justice of the Superior Court*, 200.

It here was pointed out as manifest that an ordinary action of contract is a controversy concerning property, for which the right to a trial by jury is assured by art. 15 of the Declaration of Rights. *Farnham v. Lenox Motor Car Co.* 478.

The provision of Rule 31 of the Superior Court, relating to auditors, is not in conflict with the right to a trial by jury as guaranteed by art. 15 of the Declaration of Rights, and, where it appears that a trial by jury has been claimed seasonably by a party to an action and is insisted on by such party, and where there is a real issue of fact to be tried, a cause is shown under the rule why judgment should not be entered on the auditor's report. *Ibid.*

Where the jury trial properly has been claimed and there is nothing to show that the party claiming it and opposing the auditor's report and the motion may not have evidence to controvert the auditor's findings, the court has no power to grant the motion. *Farnham v. Lenox Motor Car Co.* 478.

In the case in which the point above stated was decided, it was pointed out that assent to the appointment of an auditor or a failure to object to such a reference is not a waiver of a claim for a trial by jury which already has been filed seasonably. *Ibid.*

Rules of Court.

Common Law Rule 30 of the Supreme Judicial Court. *O'Neill v. O'Neill*, 508.

Rule 31 of the Superior Court. *Farnham v. Lenox Motor Car Co.* 478.

Waiver by Plaintiff of Right given by Statute.

In this action for personal injuries received after St. 1914, c. 553, went into effect, where the plaintiff attempted to waive the provisions of that statute and consented to the judge charging the jury that the statute put upon the defendant only the burden of going forward and did not disturb nor change the burden of proof, the jury found that the plaintiff was in the exercise of due care, and this court stated that the question, whether such a waiver by the plaintiff could be made, had become immaterial. *Grant v. Boston Elevated Railway*, 219.

Waiver of Defence.

Defendant in an action by a real estate broker cannot raise the contention, that the plaintiff was guilty of a material breach of fidelity in not communicating certain facts to the defendant, for the first time in this court or on an exception to a refusal of the judge to grant a request for a ruling that the plaintiff was not entitled to recover. *Wheelock v. Zevitas*, 167.

Where the declaration in an action of contract in the Municipal Court of the City of Boston was "for money paid for the use of and on and for the account of the defendant," and the proof was of money paid by the plaintiff at the defendant's request, if the fact that the declaration did not allege that the money was paid at the defendant's request was not called to the judge's attention, it is too late to rely on this defect in this court upon an appeal from a dismissal by the Appellate Division of a report of a finding for the plaintiff. *Serabian v. Tatian*, 191.

At the trial of an action in the Municipal Court of the City of Boston to recover sums of money paid by the plaintiff at the defendant's request to take up a promissory note, where the evidence showed that the full payment of the note was not completed until six days after the date of the writ but the defendant did not bring this to the attention of the trial judge, who found for the plaintiff, it is too late to rely on such a defence in this court upon an appeal from a dismissal by the Appellate Division of a report by the trial judge. *Ibid.*

It appeared that an action was upon a right of recovery which was alleged to have vested in the plaintiff on a certain day, but that a foreclosure sale at which the defendant was to perform his agreement did not occur until sixteen days later, but, this contention not having been raised by the defend-

Practice, Civil (*continued*).

ant either in the pleadings or at the trial and no exception having been taken, it was held that under the circumstances it was not open to the defendant in this court. *Rosenberg v. Drooker*, 205.

In an action, before the enactment of St. 1914, c. 553, against a street railway corporation by an administrator for causing the death of the plaintiff's intestate, the defendant cannot raise for the first time, at the argument before this court of its exception to the refusal of the presiding judge to order a verdict for it, the objection that the declaration contains no allegation that at the time of the injury that caused his death the intestate was in the exercise of due care. *Little v. Massachusetts Northeastern Street Railway*, 244.

In an action by the Treasurer and Receiver General for support of a pauper, which properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither lived nor had his usual place of business in that county, it was said that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise the objection either by a plea or answer in abatement or by a motion to dismiss. *Treasurer & Receiver General v. Sermini*, 248.

In an action for breach of a contract of sale, where the facts were not in dispute, it was said that the question, whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time in claiming damages, not having been raised at the trial, need not be considered by this court. *Trimount Lumber Co. v. Murdough*, 254.

Conduct of Trial.

Discretionary power of judge as to certain classes of evidence.

In an action of tort for personal injuries alleged to have been sustained by reason of the defendant's negligence, all the circumstances under which the injuries were received ordinarily may be put in evidence and a considerable degree of discretion is vested in the presiding judge at the trial as to admitting evidence to show the incidents immediately preceding and attendant upon the accident. *Harrington v. Boston Elevated Railway*, 421.

Discretionary control of examination of witness.

Upon the cross-examination as a witness of one of the parties to an action at law the exclusion of questions which properly may be regarded as immaterial and having a tendency to raise collateral issues is within the discretionary power of the presiding judge. *Kumin v. Fine*, 75.

Judge's effort at compromise.

Suggestion, by a presiding judge in the midst of a trial and not in the hearing of the jury, of a compromise was held to be in no way inconsistent with the proper performance of his duties, and certain remarks by him, among other things naming an amount, fairly construed, were held not to mean that the case had been prejudged by him. *Harrington v. Boston Elevated Railway*, 421.

Remarks by judge during trial.

Remarks of a presiding judge, who had admitted, subject to the defendant's exception, certain evidence which might have been excluded as relating to

oral conversations that afterwards were merged in and superseded by the contract in writing, postponing instructing the jury on the questions until "later on," where the matter was not again called to his attention and in his charge he instructed the jury in accordance with the contention of the defendant, were held to give to the defendant no ground for exception. *Wright v. Maynard Corset Co.* 343.

Requests, rulings and instructions.

It is right for a presiding judge to refuse to make a ruling which is not applicable to the evidence. *Millen v. Gulesian*, 27.

A refusal by a trial judge to give a ruling requested is made immaterial by a finding of the jury that an assumed fact on which the request is founded does not exist. *Ibid.*

In an action against a father for hats and veils furnished his infant daughters, the plaintiff claimed \$14 as the reasonable price and the defendant's evidence tended to prove an express contract of the plaintiff with the daughters to furnish the hats and veils for \$8 and it was held that the judge rightly refused to rule at the defendant's request "That if the plaintiff is entitled to recover in any amount then that amount cannot exceed the amount agreed upon by and between the plaintiff and the defendant's daughters." *Bisbee v. McManus*, 124.

In an action for the conversion of two earrings, it was held that, where on the evidence the defendant properly could be held liable for the value of one earring at the time of its conversion, the trial judge was right in refusing to rule "that upon all the evidence judgment must be directed for the defendant." *Rubin v. Huhn*, 126.

If, at the trial of an action by a real estate broker for his commission, there is evidence tending to show that the plaintiff did not disclose to the defendant a material fact which he learned while acting in the course of his duties as the defendant's broker, the defendant in order to rely on the defence of want of fidelity of the plaintiff must call the attention of the trial judge specifically to such a contention either by a request for a ruling or in some other way. *Wheelock v. Zevitas*, 167.

If he does not do so, he cannot raise the contention for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover. *Ibid.*

Where, at the trial of an action by the owner of real estate against a mortgagee for failure to pay to the plaintiff a sum of money in accordance with an oral agreement, there is evidence tending to show that all that the plaintiff agreed to do was to discharge his rights under a contract of sale, a request of the defendant for a ruling, in substance that the plaintiff could not recover unless the jury found that the plaintiff and his customer had released each other from the contract of sale, properly may be refused. *Rosenberg v. Drooker*, 205.

In an action for personal injuries received at an elevated railway station, it was held that the presiding judge was right in refusing to make certain rulings which might have been applicable to an accident that happened in a subway, the station at which the plaintiff's injuries were received having been a temporary elevated one. *Harrington v. Boston Elevated Railway*, 421.

Practice, Civil (*continued*).

In the same case it also was held that the presiding judge was right in refusing to make certain rulings which assumed the existence of facts that were not established indisputably. *Harrington v. Boston Elevated Railway*, 421.

In the same case it also was held that the presiding judge was right in refusing to make rulings that, whether correct or not, related to details and fragments of evidence concerning which the judge could not be required to make rulings or give instructions. *Ibid*.

Judge's charge.

An exception to a portion of the charge of a judge cannot be sustained where the facts necessarily involved in the findings of the jury show that the excepting party was not aggrieved by the portion of the charge excepted to. *Millen v. Gulesian*, 27.

Correction of error by subsequent instruction.

Where, after the admission of certain evidence subject to the defendant's exception, the presiding judge tells the jury to disregard this evidence and again in his charge instructs them that the plaintiff can recover nothing for such matters, the rights of the defendant are protected fully, and his exception to the admission of the evidence cannot be sustained. *Mikkelsen v. Connolly*, 360.

Finding by Judge.

In an action of contract on an account annexed for services rendered, where the defendant has filed a declaration in set-off for services alleged to have been rendered to the plaintiff by the defendant and the evidence is conflicting, and where the judge who hears the case finds in favor of the plaintiff for substantially the full amount of his claim, this is equivalent to a finding that the defendant is entitled to recover nothing on his declaration in set-off. *Dooley v. Murphy*, 72.

Verdict.

A presiding judge, who has submitted special questions to the jury, has discretionary power to set aside answers of the jury which are clearly inconsistent so that it cannot be said which of them is true without entering upon the province of the jury. *Hill v. Reece Buttonhole Machine Co.* 544.

New Trial.

The ordinary rule here was mentioned that the denial by a presiding judge of a motion for a new trial is not a matter of exception. *Wright v. Maynard Corset Co.* 343; *Gavin v. Durden Coleman Lumber Co.* 576.

In an action where the defendant on a motion for a new trial urged that the judge's conduct showed that he had prejudged the case, it was held that there was no ground for taking the case out of the general rule that the granting or denial of a motion for a new trial rests in the fair discretion of the trial judge. *Harrington v. Boston Elevated Railway*, 421.

It also was said that it is only where there is an abuse of sound judicial discretion or an excess of jurisdiction or some similar error of law that this court can revise the exercise of this discretion by the trial judge. *Ibid*.

In the same case it was pointed out that the defendant did not take an ex-

ception at the trial to the remarks of the judge which it made the basis of its motion for a new trial, nor did it move that the trial be suspended or that the jury be discharged by reason of the remarks, but took its chance of obtaining a verdict. *Harrington v. Boston Elevated Railway*, 421.

In the same case it was said that the record did not support a contention by the defendant that it, taken as a whole, showed such an element of prejudice against it on the part of the presiding judge that a trial fair to it could not have been had. *Ibid*.

No exception lies to a denial of a motion for a new trial by the trial judge in the proper exercise of his discretion. *Gavin v. Durden Coleman Lumber Co.* 576.

Attempt to open New Issue.

Where, in an action to recover a commission as a real estate broker, the parties and the presiding judge consistently treat the action as one to recover a broker's commission and not one to recover compensation for services as a middleman, the plaintiff at the argument before this court upon exceptions alleged by the defendant cannot be heard to contend that he was employed as a mere middleman and not as a broker and consequently was not subject to the rules governing the conduct of brokers. *Tracey v. Blake*, 57.

Exceptions.

Allowance and establishment.

Under R. L. c. 173, § 106, as amended by St. 1911, c. 212, § 1, a judge can allow exceptions only after making a preliminary finding that they "are conformable to the truth"—and, if they are not conformable to the truth, he has no authority to allow them. *Harrington v. Boston Elevated Railway*, 421.

It is wrong for a judge who has presided at a trial to indorse upon a bill of exceptions presented to him for allowance, that a certain statement contained in it is without foundation in fact but that he will "allow it as a statement of fact to prevent the delay which would be caused by sending this case to a commissioner." *Ibid*.

Where the judge who had presided at a trial indorsed upon a bill of exceptions the certificate quoted above, it was held that the excepting party was right in thereafter presenting to this court a petition to establish the truth of his exceptions. *Ibid*.

When exception lies.

No exception lies to a denial of a motion for a new trial by the trial judge in the proper exercise of his discretion. *Wright v. Maynard Corset Co.* 343; *Gavin v. Durden Coleman Lumber Co.* 576.

Remarks of a presiding judge, who had admitted, subject to the defendant's exception, certain evidence which might have been excluded as relating to oral conversations that afterwards were merged in and superseded by the contract in writing, postponing instructing the jury on the questions until "later on," where the matter was not again called to his attention and in his charge he instructed the jury in accordance with the contention of the defendant, were held to give to the defendant no ground for exception. *Wright v. Maynard Corset Co.* 343.

Practice, Civil (*continued*).

Construction of bill and record; what contentions are open.

Where, in an action to recover a commission as a real estate broker, the parties and the presiding judge consistently treat the action as one to recover a broker's commission and not as one to recover compensation for services as a middleman, the plaintiff at the argument before this court upon exceptions alleged by the defendant cannot be heard to contend that he was employed as a mere middleman and not as a broker and consequently was not subject to the rules governing the conduct of brokers. *Tracey v. Blake*, 57.

Exception to the admission, at the trial of an action for breach of a contract for the sale of certain real estate by the defendant to the plaintiff, to testimony as to the value of the real estate by a real estate expert who stated that he viewed the premises about three weeks before the trial, on the ground that the evidence related to the value of the premises at the time of the trial and not at the time of the breach of the contract, was overruled, because the record did not show that the witness was permitted to testify as to the value of the premises at the time of the trial. *Siegel v. Thern*, 172.

Defendant in an action by a real estate broker cannot raise the contention, that the plaintiff was guilty of a material breach of fidelity in not communicating certain facts to the defendant, for the first time in this court or on an exception to a refusal of the judge to grant a request for a ruling that the plaintiff was not entitled to recover. *Wheelock v. Zevitas*, 167.

In an action, before the enactment of St. 1914, c. 553, against a street railway corporation by an administrator for causing the death of the plaintiff's intestate, the defendant cannot raise for the first time, at the argument before this court of its exception to the refusal of the presiding judge to order a verdict for it, the objection that the declaration contains no allegation that at the time of the injury that caused his death the intestate was in the exercise of due care. *Little v. Massachusetts Northeastern Street Railway*, 244.

In an action for breach of a contract of sale, where the facts were not in dispute, it was said that the question, whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time in claiming damages, not having been raised at the trial, need not be considered by this court. *Trimount Lumber Co. v. Murdough*, 254.

Immaterial exception.

Exceptions to the exclusion of evidence as to the amount of damage suffered by a defendant under an alleged claim of recoupment were held to be immaterial where it appeared that the jury found that the claim was without foundation. *Trimount Lumber Co. v. Murdough*, 254.

In an action of tort, where a verdict for the plaintiff would not have been warranted, an exception to the exclusion of evidence relating to damages must be overruled, the evidence being immaterial. *DeWolfe v. Roberts*, 410.

Whether error was harmful.

An exception to a portion of a charge of a judge cannot be sustained where the facts necessarily involved in the findings of the jury show that the excepting party was not aggrieved by the portion of the charge excepted to. *Millen v. Gulesian*, 27.

A refusal by a presiding judge to give a ruling requested is made immaterial by a finding of the jury that an assumed fact on which the request is founded does not exist. *Millen v. Gulenian*, 27.

Where, at the trial of an action against a street railway corporation for damage caused by a collision of a motor car of the plaintiff and an electric car of the defendant, the driver of the plaintiff's car had testified that he already was alert and was looking out for electric cars, it was held not to have been reversible error to exclude testimony of the driver's companion that he warned the driver as they approached the place of danger. *Nathan v. Boston Elevated Railway*, 62.

Where, after the admission of certain evidence subject to the defendant's exception, the presiding judge tells the jury to disregard this evidence and again in his charge instructs them that the plaintiff can recover nothing for such matters, the rights of the defendant are protected fully, and his exception to the admission of the evidence cannot be sustained. *Mikkelsen v. Connolly*, 360.

In a claim under the workmen's compensation act error in admitting incompetent evidence of the marriage of the deceased employee and of the births of his children in alleged copies of certificates was held to have been harmless because the widow of the deceased employee in her deposition testified to the fact of her marriage with the deceased and to the birth of their three children and their ages, and this testimony was uncontradicted. *Derinza's Case*, 435.

Exceptions to erroneous instructions in the charge of the trial judge at the trial of an issue, whether undue influence was exerted upon a testatrix, were overruled because the rest of the charge rendered the error harmless. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

Judgment ordered under St. 1913, c. 716, § 1.

In this action of tort, where the jury had returned a verdict against a husband and wife jointly, this court under the power conferred by St. 1913, c. 716, § 1, ordered that judgment should be entered against the defendant husband and for the defendant wife. *McIntire v. Leland*, 348.

Appeal.

Under St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4, there is no limitation upon the kind of question of law which may come to this court by an appeal from an order of the Appellate Division of the Municipal Court of the City of Boston. *Wright v. Graustein*, 68.

Order of Judgment on Auditor's Report.

The provision of Rule 31 of the Superior Court, relating to auditors, is not in conflict with the right to a trial by jury as guaranteed by art. 15 of the Declaration of Rights, and, where it appears that a trial by jury has been claimed seasonably by a party to an action and is insisted on by such party, and where there is a real issue of fact to be tried, a cause is shown under the rule why judgment should not be entered on the auditor's report. *Farnham v. Lenox Motor Car Co.* 478.

Where the jury trial properly has been claimed and there is nothing to show that the party claiming it and opposing the auditor's report and the motion

Practice, Civil (*continued*).

may not have evidence to controvert the auditor's findings, the court has no power to grant the motion. *Farnham v. Lenox Motor Car Co.* 478.
In the case in which the point above stated was decided, it was pointed out that assent to the appointment of an auditor or a failure to object to such a reference is not a waiver of a claim for a trial by jury which already has been filed seasonably. *Ibid.*

Order of Judgment under St. 1913, c. 716, § 1.

In this action of tort, where the jury had returned a verdict against a husband and wife jointly, this court under the power conferred by St. 1913, c. 716, § 1, ordered that judgment be entered against the defendant husband and for the defendant wife. *McIntire v. Leland*, 348.

Procedure under Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Practice in Municipal Court of the City of Boston.

Practice peculiar to the MUNICIPAL COURT OF THE CITY OF BOSTON, see that title.

PROBATE COURT.

Jurisdiction.

Upon appeals from a decree allowing the will in Suffolk County of one who had died in New York, it was held that the court had jurisdiction to allow the will because the testator was abiding temporarily only in New York and had not yet lost his domicile in Boston. *White v. Stowell*, 594.

Appeal.

Under the requirements of R. L. c. 162, § 11, Equity Rule 38 and Common Law Rule 30 of the Supreme Judicial Court, a party appealing from a decree of the Probate Court must give to the adverse party or his attorney a notice in writing of the entry of his appeal as soon after such entry as is reasonably practicable and, if such a notice is not given, the appeal may be dismissed. *O'Neill v. O'Neill*, 508.

A notice of an intention to take such an appeal or of the fact that an appeal has been perfected, which is given orally only, is not a compliance with the requirements of the statute and rules. *Ibid.*

A letter written by the attorney for the appellants to the attorney for the appellees several weeks after the entry of the appeal, which enclosed a copy "of motion in the matter of the appeal from" the decree "together with proposed issues for a jury," and stated that the original was held before filing, pending a reply, is not a compliance with the statutes and rules as to notice. *Ibid.*

No power is given to the court by R. L. c. 162, § 11, to allow the giving of an original notice of an entry of an appeal from a decree of the Probate Court after the time for the giving of such original notice has expired. *Ibid.*

Under R. L. c. 162, § 13, if a party to a proceeding in the Probate Court at

the close of a hearing before the judge of that court asks to be notified in case of an adverse decision and is assured that he will receive such a notice, and thereafter a decree is entered against him of which he is given no notice, it is plain that his failure to enter an appeal from such decree within the required time is not a culpable omission or default. *Fidelity & Casualty Co. v. Wilmington*, 537.

A surety on the bond of a trustee who was discharged was held under the circumstances to have failed without default to appeal seasonably from a decree by which the former decree was vacated on the ground that the decree discharging the surety was obtained by false and misleading accounts of the trustee, and it was held that he should be granted leave under R. L. c. 162, § 13, to enter and prosecute an appeal from such decree, contesting the allegation that the accounts of the trustee were false and intended to deceive the court and the allegation that his own petition for discharge as surety was false and did deceive the court. *Ibid.*

Accounting after Appeal from Final Account.

Upon an appeal to the Supreme Judicial Court from a decree of the Probate Court upon an account of a guardian purporting to be a final account, a decree may be entered by order of a single justice which, following the practice in equity, makes an adjudication as to disbursements and charges of the guardian in connection with that account and hearings upon it up to and including the termination of proceedings respecting it. *Ensign v. Faxon*, 231.

Where a decree entered by order of a single justice upon such an appeal does not purport to make any adjudication as to disbursements and charges of the accountant since the date to which the "final account" runs and relating to the litigation as to the allowance of that account, but remands the case to the Probate Court "for further proceedings," the accountant should be permitted to file in the Probate Court a further account bringing before the court for determination the question whether such items should be allowed. *Ibid.*

The mere fact that the account which was appealed from was entitled a "final account" does not preclude the accountant from seeking an adjudication upon the later items in the subsequent account. *Ibid.*

By such an account, also, may be brought before the Probate Court the propriety of payments by the accountant of premiums upon his bond during years when the question of the allowance of the alleged final account was pending. *Ibid.*

By R. L. c. 150, § 20, the guardian is given a right also to include in such an account an item showing a payment to the ward of a balance which by the decree modifying the former account was found still to be due to the ward from him. *Ibid.*

PROXIMATE CAUSE.

Where a woman passenger before stepping from the platform of a subway station to a car operated in the subway sees a space of twelve or thirteen inches between the platform and the step of the car and then is pushed into the space and injured, she cannot contend that her injury was caused by the failure of the operating corporation to warn her of the existence of

Proximate Cause (*continued*).

the space which she noticed before her injury. *MacGilvray v. Boston Elevated Railway*, 65.

In an action by an administrator for causing the death of the plaintiff's intestate by an injury due to the negligence of a servant of the defendant, if it appears that by reason of the negligence of the defendant's servant the plaintiff's intestate sustained an injury to his kidneys that was the immediate cause of his death which was hastened thereby from one to two years, a finding is warranted that the injury was the proximate cause of his death. *Little v. Massachusetts Northeastern Street Railway*, 244.

The death of an employee, which was caused by overheating occasioned by unusually hard labor performed after the end of the ordinary work of the day and in a close and overheated atmosphere, may be found to have resulted from an injury covered by insurance under the workmen's compensation act. *Mooradjian's Case*, 521.

In a claim under the workmen's compensation act it was held that on the evidence reported a finding of the Industrial Accident Board, that the death of an employee from tuberculosis was not caused nor accelerated by an injury to his foot a year and five months earlier, was warranted. *Walsh's Case*, 599.

PUBLIC OFFICER.

In making a contract in the name of the city of Boston for the building of a section of the Dorchester tunnel, the members of the Boston transit commission act as public servants and not as servants or agents of the city. *McGovern v. Boston*, 394.

If, through negligence of the members of the Boston transit commission, misstatements of fact were made as the basis upon which bids for the work were sought and a contractor signed a contract relying upon such misstatements, to his damage, the city is not responsible for such negligence of the public officers, and it is not a ground for rescission of the contract. *Ibid*.

If, to procure as low a bid as possible from the contractor, the members of the commission wilfully misled and deceived him as to the material facts and concealed the true state of affairs from him, so that he was led to make a contract for a sum too small, the city is not responsible for such misconduct on the part of the members of the commission, who are public officers, and such misconduct is no ground for a rescission of the contract. *Ibid*.

Superintendent of streets of a town in placing in the street catch basins and gratings without any vote of the town for the purpose of diverting surface water from a public street into a culvert was held to act as a public officer so that the town was not liable for damage caused by the overflowing of a brook upon the land of a private owner caused thereby. *Blaisdell v. Stoneham*, 563.

PUBLIC SERVICE COMMISSION.

The public service commission, in making an apportionment of costs incurred by reason of the changes at Silsbee Street in Lynn under St. 1912, c. 492, § 15, in connection with the abolition of grade crossings of highways with the railroad, was substituted in place of the special commission provided for in St. 1906, c. 463, Part I, § 29. *Bay State Street Railway v. Public Service Commissioners*, 399.

Orders and rulings made by them in making such an apportionment were not orders and rulings made by them as a State board or commission. *Bay State Street Railway v. Public Service Commissioners*, 399.

Such orders and rulings therefore are not reviewable by the Supreme Judicial Court under St. 1906, c. 463, Part III, § 157, or under St. 1913, c. 784, § 27. *Ibid.*

RAILROAD.

In an action against a railroad corporation for personal injuries received when the plaintiff was run into by a train as he was crossing the tracks at a station to enter the train from the side of the tracks farthest from the station, it was said that the evidence of the use by persons of the outer space in getting upon trains on the farther track merely tended to show that the defendant had tolerated such a practice without taking measures to prevent it, and did not tend to show an invitation from the defendant to use that space. *Doherty v. New York, New Haven, & Hartford Railroad*, 135.

See also NEGLIGENCE, *Railroad*.

RELEASE.

In an action of contract by an administrator against the employer of the plaintiff's intestate upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it was no defence that the plaintiff brought an action of tort against another corporation for the injuries and death of the plaintiff's intestate in which he discharged and released the defendant, and consequently it was right for the trial judge to deny a motion of the defendant to be allowed to amend its answer by setting up such an alleged defence. *Clark v. New England Telephone & Telegraph Co.* 1.

Where an attorney at law acting for a judgment creditor assented, without authority to do so, to the release from arrest of the judgment debtor after he had been brought before a court and before any hearing had been had, it was said that it was not necessary to consider whether, if the judgment creditor had been bound by the act of his attorney, the release would have satisfied the judgment so that no action could be maintained upon it. *Hahn v. Loker*, 363.

Release executed by one, who had suffered an injury by reason of the negligence of a street railway corporation, was held, in case of the subsequent death of the injured person, not to bar an action brought by the executor of his will under St. 1906, c. 463, Part I, § 63, as amended by Sts. 1907, c. 392, § 1; 1911, c. 635; 1912, c. 354, to enforce the penalty for causing his death by the negligent act that caused the injury specified in the release. *Wall v. Massachusetts Northeastern Street Railway*, 506.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

It is no bar to the granting of a motion for a special judgment against a bankrupt defendant to enable the plaintiff to bring an action against the sureties on a bond given by such defendant to dissolve an attachment of funds in the hands of a trustee summoned by trustee process, that the same plaintiff also had made a motion for a special judgment upon a bond given to dissolve an attachment by special precept of personal property of the bankrupt, which bond the plaintiff did not file but relied upon as a common law bond, and that that motion had been denied. *Cinamon v. St. Louis Rubber Co.* 33.

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

RULES OF COURT.

Common Law Rule 30 of the Supreme Judicial Court. *O'Neill v. O'Neill*, 508.

Rule 31 of the Superior Court. *Farnham v. Lenox Motor Car Co.* 478.

Equity Rule 38. *O'Neill v. O'Neill*, 508.

Equity Rule 40. *Ibid.*

SALE.

What constitutes.

A memorandum, sent by a seller to a purchaser and containing the terms of a proposed sale and the words "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire," and "If any error in above please advise by return mail," is an offer to sell the goods, upon an acceptance of which by the prospective purchaser a binding sale would arise. *Cavanaugh v. D. W. Ranlet Co.* 366.

It could not be ruled as a matter of law that the mere failure of the prospective purchaser to reply to the memorandum above described effected an acceptance so that a binding sale resulted, and, in an action on the alleged contract, it is for the jury to say whether under all the circumstances the silence of the alleged purchaser amounted to an assent. *Ibid.*

Delivery.

In an action of contract for the price of certain lumber, where the defendant filed an answer in recoupment alleging that the lumber was not delivered within the time required by the contract, an instruction that, if the buyer claimed to have been damaged through delay in delivering or lack of quantity or quality of which he knew or ought to have known and failed within a reasonable time after acceptance to notify the seller that he claimed damages, although particular defects need not be specified, he could not recover, even if he had suffered damage from a breach of the contract, was held to be in conformity with the provisions of the sales act contained in St. 1908, c. 237, as well as with the common law before its passage. *Trimount Lumber Co. v. Murdough*, 254.

In the case above described, it also was held that the verdict of the jury for

the plaintiff in the full amount claimed was a conclusive finding that the defendant was entitled to no damages in recoupment because he had failed to give notice of his claim within a reasonable time, and therefore exceptions of the defendant to the exclusion of evidence which he contended was admissible to show the amount of the damages suffered by him became immaterial. *Trimount Lumber Co. v. Murdough*, 254.

In the same case it was said that, the facts not having been in dispute, the question, whether the judge should have ruled as matter of law that the defendant had not acted within a reasonable time, not having been raised at the trial, need not be considered by this court. *Ibid.*

Where, in attempted pursuance of a contract of a salt company to sell to a customer "F. O. B. cars" at point of destination, four hundred bags of salt at an agreed price, a railroad corporation as the agent of the salt company tenders to the customer the contents of a car containing not only the four hundred bags of salt called for by the contract but also fifteen barrels of salt that had been bought by another person, the customer has the right under St. 1908, c. 237, § 44, cls. 2, 3, either to accept the part of the salt described in his contract "and reject the rest, or he may reject the whole." *Rock Glen Salt Co. v. Segal*, 115.

Rescission.

In a suit in equity by the members of a firm of shoe dealers against the administrators *de bonis non* of the estate of a testator, the executors of whose will had continued his business and had purchased merchandise of the plaintiffs as executors, to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*, it appearing that the goods might have been identified and separated, but that they were not and that afterwards all the goods in the store had been sold for a single price, it was held that it was too late for the plaintiffs to rescind their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds. *Donnelly v. Alden*, 109.

In an action to recover \$275 paid by the plaintiff to the defendant for the chassis of a motor car that had been injured by fire, where there was evidence that the plaintiff had paid the price agreed upon and as between the parties had acquired title to the chassis but that the defendant refused to deliver it or give a good title to it, it was held that the plaintiff was entitled to go to the jury. *Weld v. Stiles*, 179.

The mere facts, that a carload of oats was shipped by a bill of lading to the seller's order, that the bill of lading was indorsed by the seller and was attached to a draft upon the purchaser for the amount of the purchase price less the freight, and that the purchaser, without examining the contents of the car, paid the draft and received the carload, were held not as a matter of law to estop the purchaser from rescinding the sale upon discovering that the oats are not of the quality which he agreed to purchase. *Cavanaugh v. D. W. Ranlet Co.* 366.

Question, whether the purchaser waived the warranty, was held to have been one to be determined as a question of fact. *Ibid.*

Ratification.

In an action to recover the price of hats and veils furnished to infant daughters of the defendant to wear at the funeral of their mother, if it appears "that the defendant neither expressly nor impliedly authorized the purchase of the goods," but it appears that he permitted his minor daughters to use the articles, which were purchased by them from the plaintiff with his knowledge, and that he afterwards offered to pay a certain price for the articles, which his daughters asserted was the agreed price, it can be found that he adopted and ratified the purchase. *Bisbee v. McManus*, 124.

Warranty.

Where, at the trial of an action for breach of a warranty of the quality of oats sold by the defendant to the plaintiff and to be delivered to the plaintiff at a city in New Hampshire, there is no evidence of the law of that State, the rights of the parties are to be determined at common law. *Caranough v. D. W. Ranlet Co.* 366.

Where, at the trial of an action for a breach of warranty of quality in an oral contract of sale to the plaintiff of four carloads of oats, it appears that three of the carloads were accepted by the plaintiff and were paid for, the statute of frauds is not a defence. *Ibid.*

The mere facts, that a carload of oats was shipped by a bill of lading to the seller's order, that the bill of lading was indorsed by the seller and was attached to a draft upon the purchaser for the amount of the purchase price less the freight, and that the purchaser, without examining the contents of the car, paid the draft and received the carload, were held not as a matter of law to estop the purchaser from rescinding the sale upon discovering that the oats are not of the quality which he agreed to purchase. *Ibid.*

Question, whether the purchaser waived the warranty, was held to have been one to be determined as a question of fact. *Ibid.*

Where, at the trial of the action above described there is evidence upon which, under suitable instructions, the jury would have been warranted in finding that before the oats reached that city they were in a condition unfit for sale, it would be improper for the judge to order a verdict for the defendant although there was a provision of the contract of sale which required him to examine the oats and to notify the seller of any failure of them to conform to the warranty "not later than the following business day after arrival of the car at destination." *Ibid.*

Upon the evidence at the trial above described, and under suitable instructions, it further was held that the jury would have been warranted in finding that the word "arrival" in the provision above described was understood and intended by the parties to mean that, until the car had been detached and placed on a siding where it could be reached, inspected and unloaded in the course of the carrier's business, and notice had been given to the purchaser, possession was not taken by the purchaser and the time within which he should notify the seller of a breach of warranty had not begun to run. *Ibid.*

Where, therefore, under such circumstances, there was further evidence warranting findings that the carrier made a mistake in placing the car where it still remained inaccessible, that, immediately upon rectification of such

error, inspection by the purchaser followed, the breach of warranty was discovered and the seller was notified of that fact on the following day by telephone, it could not properly have been ruled as a matter of law that the defence of non-compliance by the purchaser with the rule above described, if that rule was a part of the contract of sale, had been proved. *Cavanaugh v. D. W. Ranlet Co.* 366.

SALES ACT.

Instruction as to effect of failure of a buyer to notify the seller that he claimed damages by reason of a breach of the contract of sale, which was held to be in conformity with St. 1908, c. 237. *Trimount Lumber Co. v. Murdough*, 254.

SAVINGS BANK.

Circumstances under which a woman when about to start for Nova Scotia on a visit, caused certain savings bank deposits to be transferred to the joint names of herself and her niece were held to be such that the woman might maintain a suit in equity to enforce the oral trust in personal property by compelling the niece to deliver the bank books to her together with a proper assignment of them. *Bradford v. Eastman*, 499.

In the case described above in regard to enforcing an oral trust in certain savings bank deposits, it was stated that the testimony of the plaintiff, that in the presence of the defendant she told the officers of the savings banks that she wanted the deposits put in the joint names of herself and the defendant so that she could draw money when she "went down East," plainly was admissible. *Ibid.*

SCHOOL AND SCHOOL COMMITTEE.

Under R. L. c. 42, § 27, providing that the school committee of a town or city "shall have the general charge and superintendence of all the public schools," the action of a school committee in excluding a child from the schools, if taken in good faith and in accordance with the provisions of the statutes, is not reviewable by the courts. *Carr v. Dighton*, 304.

The mere failure of a school committee to grant a hearing to the father of children excluded by the committee from the public schools does not render the exclusion illegal as matter of law, if the school committee acted in good faith. *Ibid.*

The provision of R. L. c. 44, § 8, that "A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him an opportunity to be heard," does not apply to the exclusion of a pupil from the public schools on the ground that he has head lice. *Ibid.*

Upon the evidence in actions against a town by three children for alleged unlawful exclusion from the public schools by the school committee of the defendant on the ground that they had head lice, it was held that it must be assumed that the jury found that the exclusion of the plaintiffs from school was not in good faith and that there was evidence for the jury warranting such a finding. *Ibid.*

In the case above described it was held that a certificate made by a physician who had died before the trial, stating that he had examined the heads of

School and School Committee (*continued*).

the plaintiffs and had found no vermin, properly was admitted in evidence under R. L. c. 175, § 66, after having been found by the presiding judge to be the declaration of a deceased person made in good faith before the commencement of the action and upon the personal knowledge of the declarant. *Carr v. Dighton*, 304.

SCIRE FACIAS.

Against one adjudged a trustee in an action begun by trustee process, see TRUSTEE PROCESS.

SET-OFF.

In an action of contract on an account annexed for services rendered, where the defendant has filed a declaration in set-off for services alleged to have been rendered to the plaintiff by the defendant and the evidence is conflicting, and where the judge who hears the case finds in favor of the plaintiff for substantially the full amount of his claim, this is equivalent to a finding that the defendant is entitled to recover nothing on his declaration in set-off. *Dooley v. Murphy*, 72.

SETTLEMENT.

The provision contained in R. L. c. 80, § 6, (repealed by St. 1911, c. 669, § 7,) that "A person who is absent from the Commonwealth for ten consecutive years shall lose his settlement," does not apply to the derivative settlement of a wife, which she acquired by marrying a man then having a settlement in this Commonwealth which he afterwards lost by leaving the Commonwealth and remaining continuously absent for ten years thereafter while his wife continued to live in this Commonwealth without acquiring any other settlement. *Treasurer & Receiver General v. Boston*, 83.

SEWER.

A drain, laid out by the board of sewer commissioners of a town without a vote of the town, which was built by a contractor under the direction of the superintendent of sewers of the town and was constructed "to take care of the surface water" of a particular part of one street only of the town, is not a main drain within the meaning of R. L. c. 49, §§ 1, 3, and the town is not liable at common law for injuries resulting to a traveller upon the way due to a negligent placing of an improper cover over one of its catch basins. *Delamaine v. Revere*, 403.

A town is not liable at common law for personal injuries received by a traveller upon a public way and caused by ignorance or negligence of the board of sewer commissioners of the town in their determination of the location of a main drain or a catch basin or of the form or pattern of a catch basin cover. *Ibid*.

A town is not liable at common law for personal injuries resulting to a traveller upon a public way and due to his crutch slipping through the cover of a drain concealed by newspapers which the town officials had permitted to be sold in the streets and by circulars which they had permitted to be distributed in the streets even though it was reasonably certain that the papers and

circulars would be thrown into the streets and would accumulate in places to which they might be driven by the wind. *Delamaine v. Revere*, 403.

SLANDER.

See LIBEL AND SLANDER.

SNOW AND ICE.

Under the provisions of St. 1908, c. 305, as to a notice in writing of the time, place and cause of the injury, which is made a condition precedent to recovery for injury from a defective condition of a building caused by or consisting in part of snow or ice, a proper notice in writing sent by mail to the owner of the building in control of it is a compliance with the statute. *Tobin v. Taintor*, 174.

In an action for such injuries, evidence of the mailing of a letter containing such a notice by the plaintiff's attorney three days after the injury to the defendant at his business address in Boston, that on the corner of the envelope was printed a request to return the letter, if not delivered, to the address of the writer there stated and that the letter was not returned, was held to warrant a finding that the notice was sent and received. *Ibid.*

In an action for personal injuries sustained by falling on ice on the sidewalk in front of the house of the defendant that was formed from water flowing from a conductor, there was no evidence tending to show that the defendant controlled the conductor or that any water from his house drained into it, and it was held that there was no ground on which the defendant could be found to be liable. *Sanborn v. McKeagney*, 300.

In the action above described there was no evidence of any ordinance requiring the defendant to keep the sidewalk adjoining his house free from snow and ice, but it was said, that, even if there had been such evidence, the defendant could not have been found to have been liable. *Ibid.*

St. 1913, c. 324, which amended St. 1908, c. 305, by making certain additions relating to notice to its provisions that §§ 20, 21, and 22 of R. L. c. 51, "in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice," and re-enacted St. 1908, c. 305, as amended, made applicable to the actions therein described the provisions of R. L. c. 51, § 21, as it had been amended, and re-enacted as amended, by St. 1912, c. 221. *Merrill v. Paige*, 511.

The requirements of the statutes above referred to are met by a notice to the owner of a building, sent in behalf of a woman by her husband and reading as follows: "My wife fell on the sidewalk in front of a building owned by you on Market Street, Monday morning, Dec. 18, 1916, and injured herself and is now under the care of a doctor. The fall was caused by the icy condition of the sidewalk." *Ibid.*

The above notice in writing satisfies the requirements of the statutes although it was signed by the husband in his own name and nowhere contained a statement that he signed it in behalf of his wife. *Ibid.*

Snow and Ice (*continued*).

It is enough if it reasonably appears in such a notice that it is given in behalf of the injured person and it is not necessary that it should so affirm in terms. *Merrill v. Paige*, 511.

SOCIAL CLUB.

Action by one who had been a member of an incorporated social club against the members of the governing committee of the club for the alleged unlawful expulsion of the plaintiff. *Richards v. Morison*, 458.

STATUTE.

Where a statute imposing taxation is not declared to be retroactive, it cannot be extended by implication to make it so. *Faulkner v. Tax Commissioner*, 120.

Application of the above principle to St. 1916, c. 269, imposing a tax upon incomes. *Ibid.*

A contractor, in making with the city of Boston through the Boston transit commission a contract for the construction of a section of the Dorchester tunnel, was chargeable with knowledge of the requirements of St. 1911, c. 741, § 17, as to such a contract. *McGovern v. Boston*, 394.

Where the provisions of certain sections of a statute are incorporated by reference into another statute and are made to apply to the cases there provided for, the sections thus incorporated are adopted with their existing amendments, although no amendments are mentioned. *Merrill v. Paige*, 511.

Application of the foregoing rule to the amendment of St. 1908, c. 305, by St. 1913, c. 324. *Ibid.*

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 749.

STREET RAILWAY.

The existence of a space of twelve or thirteen inches between a subway platform and a car operated in the subway which passengers are invited to enter is not evidence of negligence on the part of the operating corporation. *MacGillivray v. Boston Elevated Railway*, 65.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Where in an action of contract the defendant has claimed seasonably a trial by jury and the case is referred to an auditor who makes a finding for the plaintiff, if the plaintiff moves under Rule 31 of the Superior Court for the entry of judgment on the auditor's report and the defendant opposes this motion and insists on his right to a trial by jury and there is nothing to show that the defendant may not produce at the trial evidence to controvert the auditor's report and overcome the finding of the auditor, the trial judge has no power to grant the plaintiff's motion for the entry of judgment. *Farnham v. Lenox Motor Car Co.* 478.

SUPREME JUDICIAL COURT.

The rulings or orders of a State board or commission, to review, annul, modify or amend which jurisdiction in equity is given to the Supreme Judicial Court by St. 1906, c. 463, Part III, § 157, and by St. 1913, c. 784, § 27, are such rulings or orders as are made by the board or commission acting as such. *Bay State Street Railway v. Public Service Commissioners*, 399.

The Supreme Judicial Court has no jurisdiction in equity under St. 1906, c. 463, Part III, § 157, or under St. 1913, c. 784, § 27, to review, annul, modify or amend an order or ruling made by the public service commission when acting as a special commission under St. 1912, c. 492, § 15, as above described. *Ibid.*

SURETY.

It is no bar to the granting of a motion for a special judgment against a bankrupt defendant to enable the plaintiff to bring an action against the sureties on a bond given by such defendant to dissolve an attachment of funds in the hands of a trustee summoned by trustee process, that the same plaintiff also had made a motion for a special judgment upon a bond given to dissolve an attachment by special precept of personal property of the bankrupt, which bond the plaintiff did not file but relied upon as a common law bond, and that that motion had been denied. *Cinamon v. St. Louis Rubber Co.* 33.

Upon the motion described above, where the two bonds mentioned created independent liabilities and the sureties upon them were not the same, it was said that the remedies on the two bonds were not inconsistent and that the plaintiff had a right of action upon each of them, but that, if they had been inconsistent and the plaintiff had been mistaken in supposing that he had two such rights and had chosen the one to which he was not entitled, this would not bar him from exercising the other right if he was entitled to it. *Ibid.*

TAX.

On Personal Property of Foreign Corporation.

When a foreign corporation comes into this Commonwealth to transact a local or intrastate business, it assents to be bound by our laws respecting such corporations, including the laws relating to taxation so far as they are valid. *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.* 494.

Tax (continued).

Foreign corporation, which had a contract to furnish a city in this Commonwealth with fire alarm lamps and with "boulevard lanterns, burners, domes and incandescent mantles" for the lighting of public streets, parks and other public places, was held under the circumstances of its ownership of certain personal property to be liable to taxation thereon under St. 1909, c. 516, § 2, and St. 1909, c. 490, Part I, § 23, cl. 1. *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.* 494.

There is nothing in the statutes that authorize the collection of such a tax from a foreign corporation which violates any provision of the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

On Trust Property.

Where in a return made by trustees to the assessors of a city of the taxable personal property in their hands as such trustees they included an item of "office furniture" in an office used by the trustees, and there was nothing to indicate that the trustees carried on a business therein within the meaning of St. 1909, c. 490, Part I, § 23, cl. 1, it was held that the office furniture was subject to taxation with the securities held by the trustees as a part of an indivisible fund. *Crocker v. Malden*, 313.

Action of three trustees of a trust created by the will of a resident of this Commonwealth, only one of whom was a resident of the Commonwealth, the sole beneficiary of the trust not being a resident of the Commonwealth, in filing with the assessors of a city in this Commonwealth a joint return of the taxable personal property in their hands as such trustees, was held to have been within the lawful power of the trustees. *Ibid.*

It also was held that the two non-resident trustees thereupon became subject to assessment in that city jointly with their co-trustee, who was a resident of that city. *Ibid.*

In the case in which the point above stated was decided, it was said that the court did not intend to decide that the property could not have been assessed lawfully to the resident trustee alone. *Ibid.*

On Legacies and Successions.

Under the provisions of a will as to residue placed in trust, that the trustees should hold it for twenty-five years and pay to the testator's children the net yearly income in equal shares, but not to exceed \$150,000 in any one year, for a period of ten years, with further provisions to take effect at the end of the ten year and of the twenty-five year period, it was held that the interests of the children in the gifts of income for the first ten years, having vested in possession, were subject to the legacy tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1. *Milton v. Treasurer & Receiver General*, 140.

Upon a petition under St. 1909, c. 490, Part IV, § 21, by the executors of the will above described praying for the determination of questions in regard to the legacy and succession taxes due upon the estate of the testator, it was held that under St. 1909, c. 490, Part IV, § 4, executors who have performed their present duties are not entitled to instructions as to what their duties may be upon the happening of future events with which they may have no official connection, and accordingly this court refused to in-

struct the petitioners as to what legacy taxes would be payable at the expiration of the period of ten years mentioned above. *Milton v. Treasurer & Receiver General*, 140.

In the same case it was held that one of the petitioning executors, who also joined in the petition individually as a beneficiary of income and as one of the remaindermen, would be entitled under St. 1909, c. 490, Part IV, § 7, to have the tax upon his future interest determined and certified, if he was "willing to waive the right to a possible diminution in the value of his interest by the birth of additional issue" and if the tax was susceptible of computation; but in the present case owing to elements of uncertainty the Tax Commissioner determined that it was impossible to compute the present value of the future interest. *Ibid.*

In the same case it also was held that, upon an application under St. 1909, c. 490, Part IV, § 7, to the Tax Commissioner to determine the actual value of the interest of the petitioner or to exercise the power given him by that section, where it is impossible to compute the present value of the future interest, in order to effect, with the approval of the Attorney General, such a settlement of the tax as he shall deem to be for the best interests of the Commonwealth, if the Tax Commissioner commits no error of law, his decision of fact that the present value of the petitioner's interest cannot be computed is final, and whether he will, with the approval of the Attorney General, effect a settlement of the tax rests wholly in the exercise of his sound discretion and judgment, and his refusal to exercise the power is not reviewable. *Ibid.*

In a case to which the provisions of St. 1909, c. 527, § 8, do not apply, where a testator, who left debts exceeding by a large sum the amount of his own property, exercised by his will a general power of appointment given him by the will of his father, appointing the principal of a trust fund to certain persons named, a legacy and succession tax under St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1, cannot be levied on the amount of the entire fund appointed but only on the balance of that fund which actually goes to the appointees after the payment of the debts of the testator. *Hill v. Treasurer & Receiver General*, 474.

On Income.

St. 1916, c. 269, imposing a tax upon the income received from certain forms of intangible property and from trades and professions, does not apply to the income received before his death by a testator who died in the year 1916 nor to the income received by the executors of his will from his estate from the time of his death to the end of the year 1916. *Faulkner v. Tax Commissioner*, 120.

A covenant in a lease of real estate, by which the lessee agrees to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments," binds the lessee to pay all taxes except betterments imposed upon the real estate but not taxes imposed upon the income in the form of rent accruing therefrom. *Codman v. American Piano Co.* 285.

Covenant relative to taxes in a lease of city real estate as to which, in an action by the lessors against the lessees on this covenant to recover the

Tax (continued).

amount of the normal federal income tax on the rent, which had been withheld by the lessees, it was held that the lessees were liable to pay to the plaintiffs the amount of the federal income tax imposed on the rent during the period described in the covenant, a phrase, "but not for any other taxes or excises in respect thereof," referring merely to income taxes retroactively levied beyond the express limitation of the covenant. *Kimball v. Cotting*, 541.

TAX COMMISSIONER.

Upon an application under St. 1909, c. 490, Part IV, § 7, to the Tax Commissioner to determine the actual value of a future interest of the petitioner or to exercise the power given him by that section, where it is impossible to compute the present value of the future interest, in order to effect, with the approval of the Attorney General, such a settlement of the tax as shall deem to be for the best interests of the Commonwealth, if the Tax Commissioner commits no error of law, his decision of fact that the present value of the petitioner's interest cannot be computed is final, and whether he will, with the approval of the Attorney General, effect a settlement of the tax rests wholly in the exercise of his sound discretion and judgment, and his refusal to exercise the power is not reviewable. *Milton v. Treasurer & Receiver General*, 140.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADEMARK.

In an action to recover the amount which should have been payable to the plaintiff as royalties on the use of a trademark called "Cresco" in the sale of a certain kind of corset, a covenant of the defendant to use its utmost endeavors to manufacture and sell corsets under the plaintiff's trademark was held to be an affirmative and independent agreement for the plaintiff's benefit, for the breach of which he was entitled to recover such a sum of money as would have been due and payable to him had the covenant been kept and performed. *Wright v. Maynard Corset Co.* 343.

TRESPASS.

Actions of trespassers for personal injuries, see appropriate subtitle under NEGLIGENCE.

TRUST.

Creation.

Where a husband conveys property to his wife, without any agreement on the part of the wife as to the way in which she shall hold it, there is no presumption that it is received in trust and the wife as between herself and her husband holds the property absolutely, an unexpressed intention of the husband in making the conveyance being immaterial as between the parties to it. *English v. English*, 11.

Vesting of Interest.

A deed conveying property to a trustee to pay the income to the settlor during his life and upon his death leaving no issue "to distribute said trust fund among those who would take his real and personal property if he had then died intestate," was held not to give to a bankrupt brother a vested interest in the trust fund before the persons who were to take that fund were determined upon the death of the settlor, so that, after the death of the settlor, the trustee in bankruptcy of the brother, who was his next of kin and had been declared a bankrupt before the settlor's death, had no claim upon the fund. *Hall v. Farmer*, 103.

Validity.

Requirement in a deed of certain real estate to a college corporation in trust to use the income for the increase and benefit of a literary and benevolent fund of the college, previously established by the donor, that one half of the income of the fund should be paid over to the grantor "or his nearest heir" of his name "for the time being, who shall demand it" was held to be void because in violation of the rule against perpetuities. *Amory v. Amherst College*, 374.

It also was held that the deed created two distinct trusts, one for the benefit of the college and the other for the benefit of the grantor and certain of his descendants; that the first trust remained valid although the second was invalid, and that, because of the invalidity of the second trust, the beneficial interest therein resulted to the grantor. *Ibid.*

Construction of Instrument creating Trust.

It was held that a deed of certain real estate created two distinct trusts, one for the benefit of a college and the other for the benefit of the grantor and certain of his descendants; that the first trust remained valid although the second was invalid, and that, because of the invalidity of the second trust, the beneficial interest therein resulted to the grantor. *Amory v. Amherst College*, 374.

Upon a reading of the entire deed creating the above described trust, it was held that it was the intention of the grantor to convey the real estate to the college corporation in fee simple in trust, and not to create an estate upon a condition subsequent. *Ibid.*

In further construction of the deed above described, it was held that it plainly appeared that the parties did not intend that a mere use should be created to be executed under the statute, but that the college corporation should take an estate in fee in trust imposing active, diligent and continuing duties upon the trustee. *Ibid.*

Declaration and conduct of the officers of the college corporation and of the grantor in the deed above described made after the delivery of the deed and before the death of the grantor were considered in determining what was the meaning of the provisions of the deed which upon their face were doubtful. *Ibid.*

Oral.

Circumstances under which a woman when about to start for Nova Scotia on a visit, caused certain savings bank deposits to be transferred to the joint names of herself and her niece were held to be such that the woman might maintain a suit in equity to enforce the oral trust in personal property by compelling the niece to deliver the bank books to her together with a proper assignment of them. *Bradford v. Eastman*, 499.

In the case described above in regard to enforcing an oral trust in certain savings bank deposits, it was stated that the testimony of the plaintiff, that in the presence of the defendant she told the officers of the savings banks that she wanted the deposits put in the joint names of herself and the defendant so that she could draw money when she "went down East," plainly was admissible. *Ibid.*

Constructive.

In a suit in equity by the members of a firm of shoe dealers against the administrators *de bonis non* of the estate of a testator, the executors of whose will had continued his business and had purchased merchandise of the plaintiffs as executors, to impress a trust for their claim upon the funds remaining in the hands of the administrators *de bonis non*, it appearing that the goods might have been identified and separated, but that they were not and that afterwards all the goods in the store had been sold for a single price, it was held, that it was too late for the plaintiffs to rescind their sales of goods, or, if they could have rescinded the sales, to follow the goods or their proceeds. *Donnelly v. Alden*, 109.

Resulting.

It was held that a deed of certain real estate created two distinct trusts, one for the benefit of a college and the other for the benefit of the grantor and certain of his descendants; that the first trust remained valid although the second was invalid, and that, because of the invalidity of the second trust, the beneficial interest therein resulted to the grantor. *Amory v. Amherst College*, 374.

In the case of the resulting trust above described, the statute of limitations did not begin to run in favor of the trustee and against the beneficiary at the time of the delivery of the deed creating the trust. *Ibid.*

Upon the evidence before a master to whom was referred a bill in equity to enforce a resulting trust in land which had been conveyed to a trustee upon trusts, part of which were invalid, and upon certain facts found by the master, it was held that the trustee to the knowledge of the beneficiary had repudiated the rights of the beneficiary about thirty-nine years before the beginning of the suit and had remained steadfast in that position, and therefore that the suit could not be maintained. *Ibid.*

At the hearing by a master of a suit in equity against a college corporation to enforce a resulting trust, in which one of the issues was, whether the defendant had acknowledged the trust within the period of the statute of limitations, it appeared that the authority of the treasurer of the corporation was limited, and it was held that he had no authority to bind the

corporation by his letters, accounts, statements or bookkeeping entries, so that evidence of that character should not have been admitted. *Amory v. Amherst College*, 374.

Evidence in the same suit was held to show that it was barred by laches. *Ibid.*

As to a resulting trust arising under a similar deed, where the income, however, was not to be divided until 1928, it was held that the statute of limitations had not begun to run because the time had not yet arrived for the plaintiff to have possession. *Ibid.*

It also was held that, the plaintiff not yet having a right to possession of this property last referred to, the bill must be dismissed as to that property also. *Ibid.*

The statute of limitations will not begin to run to bar the rights of a beneficiary under a resulting trust as against the trustee until the trustee has repudiated the beneficiary's claim openly and notoriously. *Ibid.*

Sale of Real Estate by Trustee.

Agreement by trustee to sell real estate to a certain person provided the court approved was held to be non-enforceable where, before the court approved, the trustee filed a new petition for approval of a sale to another person for a larger price. *Grennan v. Pierce*, 292.

In the case above described it also was pointed out that the fact that the trustee had authority under the will to make the sale without a license did not affect the validity of the requirement in the contract of the procuring of a license from the Probate Court as a condition precedent to a sale. *Ibid.*

In the same suit it was said that the defendant trustee had committed no breach of contract and that in informing the Probate Court of the higher offer he had performed his plain duty as trustee. *Ibid.*

Taxation.

Taxation of "office furniture" used by trustees. *Crocker v. Malden*, 313.

Action of three trustees of a trust created by the will of a resident of this Commonwealth, only one of whom was a resident of the Commonwealth, the sole beneficiary of the trust not being a resident of the Commonwealth, in filing with the assessors of a city in this Commonwealth a joint return of the taxable personal property in their hands as such trustees, was held to have been within the lawful power of the trustees. *Ibid.*

It also was held that the two non-resident trustees thereupon became subject to assessment in that city jointly with their co-trustee, who was a resident of that city. *Ibid.*

In the case in which the point above stated was decided, it was said that the court did not intend to decide that the property could not have been assessed lawfully to the resident trustee alone. *Ibid.*

Bill in Equity for Instructions.

See appropriate subtitle under EQUITY JURISDICTION.

TRUSTEE PROCESS.

It is no ground for abatement of an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the plaintiff is a resident of another State and the defendant is a resident of Cambridge and the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, that this trustee has no effects or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith. *Wright v. Graustein*, 68.

In the case stated above it was said that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected. *Ibid*.

It here was pointed out that, in R. L. c. 189, §§ 45-49, relating to a writ of scire facias against a person adjudged a trustee in an action begun by trustee process, there is no provision for a trial by jury on the scire facias. *MacAusland v. Fuller*, 316.

The default of a trustee in an action begun by trustee process upon his failure to answer more fully certain interrogatories when ordered by the court to do so is not an adjudication of the amount due from the trustee, and upon a writ of scire facias to enforce against him the judgment of default all matters of defence as to the amount due from the trustee which have not been passed upon previously by the court are open to him. *Ibid*.

Upon a writ of scire facias, where oral testimony was offered by the defendant giving full answers to interrogatories which he had failed to answer fully in writing, and this evidence was admitted by the trial judge, subject to the plaintiff's exception, it was held that, although by correct procedure these answers should have been in writing, yet under the circumstances no substantial right of the plaintiff was affected by the reception of the evidence. *Ibid*.

On the same writ of scire facias it also was held that, as the credibility of the oral testimony of the defendant was wholly to be determined by the trial judge, there could be no error of law in his finding based upon it reducing the amount for which the trustee was charged. *Ibid*.

UNDUE INFLUENCE.

Exceptions to erroneous instructions in the charge of the trial judge at the trial of an issue, whether undue influence was exerted upon a testatrix, were overruled because the rest of the charge rendered the error harmless. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

UNION.

Labor union, see LABOR AND LABOR UNION.

UNITED STATES MAIL.

A mail carrier, driving a horse attached to a mail wagon and engaged in distributing the United States mail on a public highway or on a public

parkway, is subject to the rules and regulations made respectively by the street commissioners and the park commissioners requiring a traveller to drive on the right hand side of a road and in turning to the left into another street to pass to the right of and beyond the centre of the intersecting street before turning. *Commonwealth v. Closson*, 329.

U. S. St. 1884, c. 9, relating to post routes, does not contravene the rule that the public ways laid out and maintained by the Commonwealth and its subdivisions can be altered or discontinued only by the authorities that laid them out and that such authorities also have the power of supervision and control inherent in the Commonwealth and can make and enforce reasonable regulations for the use of such public ways. *Ibid*.

Certain regulations by street commissioners and park commissioners as to use of highways were held to be reasonable and constitutional and their violation punishable as a criminal offence. *Ibid*.

UNLAWFUL INTERFERENCE.

In a suit in equity, by a corporation established for the purpose of carrying on the business of a public garage and licensed to conduct such business, to restrain alleged unlawful interference with its business, the bill must be dismissed if the plaintiff fails to prove that it was engaged in the business of carrying on a public garage. *Marion Street Garage Co. v. Sugden*, 130.

In a suit in equity by six plaintiffs, each engaged in a different business, to enjoin an alleged anticipated unlawful interference with their business, the defendant demurred, assigning various causes of demurrer but not assigning as a cause of demurrer the improper joinder of the plaintiffs in a single suit, and the question of misjoinder of the plaintiffs was treated by this court as not open upon the demurrer. *Shuman v. Gilbert*, 225.

A suit in equity cannot be maintained by one engaged in business to enjoin the chief of police of a city from committing an alleged apprehended unlawful interference with the plaintiff's business by instituting a complaint against the plaintiff for an alleged violation of R. L. c. 65, § 13, as amended by St. 1916, c. 242, § 1, in regard to hawkers and pedlers by exhibiting samples of his goods in a room hired by him in a hotel in that city without first obtaining a license. *Ibid*.

Averments, in a count of a declaration by a lessee against the lessor, of unlawful interference by a lessor with subtenants of the lessee and preventing them from paying rent to the lessee, were held to be matters of inducement merely introductory to an allegation of ouster or eviction, which was the essential subject of the count on which the plaintiff relied, so that it was not necessary to consider whether the facts contained in an offer of proof by the plaintiff would have supported a count for unlawful interference with the plaintiff's rights under the contract contained in the lease. *Aguglia v. Cavicchia*, 263.

A combination of the musicians in a city, by which a proprietor of a place of entertainment in the city in order to employ any member of the combination is compelled to employ a specified number of other members, is illegal as an unjustifiable interference with the right to such free flow of labor as every member of a community is entitled to for the purpose of carrying on

Unlawful Interference (continued).

the business which he has chosen to undertake. *Haverhill Strand Theatre, Inc. v. Gillen*, 413.

The proprietor of a moving picture theatre, who wishes to employ a single musician to play the organ at all performances given there, can maintain a suit in equity against the members of a labor union of musicians to enjoin the defendants from enforcing against him a minimum rule adopted by the union, by which the plaintiff in order to employ any member of the union is required to employ an orchestra of not less than five musicians. *Ibid.*

In a suit in equity against the members of an unincorporated labor union to enjoin the defendants from interfering with the plaintiff carrying on his business in his own way, if the plaintiff shows that the combination of the defendants was for an illegal purpose declared in a rule, he is entitled to relief on showing that the defendants intend to enforce their declared purpose, and it is not necessary for him to go further and prove that the defendants threaten to enforce the purpose expressed in their rule by means which are illegal. *Ibid.*

USAGE.

See CUSTOM.

VENUE.

It is no ground for abatement of an action of contract brought in the Municipal Court of the City of Boston by trustee process, where the plaintiff is a resident of another State and the defendant is a resident of Cambridge and the only party giving jurisdiction to the court is one of two corporations summoned as trustees, whose usual place of business is in Boston, that this trustee has no effects or credits of the defendant in its hands, if the plaintiff inserted its name in the writ and caused it to be summoned as trustee in good faith. *Wright v. Graustein*, 68.

In the case stated above it was said that, if it had appeared that the insertion of the name of that trustee in the writ was merely colorable for the purpose of appearing to confer jurisdiction upon the Municipal Court of the City of Boston, the defendant upon seasonably raising that point would have been protected. *Ibid.*

In an action by the Treasurer and Receiver General for support of a pauper, which properly was brought under R. L. c. 167, § 4, in the county of Suffolk, although the defendant neither lived nor had his usual place of business in that county, it was said that, if there had been an error in the venue, the defendant could not have taken advantage of it, because he did not raise the objection either by a plea or answer in abatement or by a motion to dismiss. *Treasurer & Receiver General v. Sermini*, 248.

VERDICT.

See PRACTICE, CIVIL.

WAIVER.

Defendant in an action by a real estate broker cannot raise the contention, that the plaintiff was guilty of a material breach of fidelity in not communi-

- cating certain facts to the defendant, for the first time in this court or on an exception to a refusal of the judge to grant a general request for a ruling that the plaintiff was not entitled to recover. *Wheelock v. Zevitas*, 167.
- Contention, that the requirement of a five days' notice in writing as a condition precedent to the enforcement of a claim for damages in the transportation of a horse had been waived by the station agent of the carrier who was on the platform when the horse arrived, was held to be unfounded because it was not shown that the agent had any authority to waive the requirement. *Fletcher v. New York Central & Hudson River Railroad*, 258.
- In the same case it was said that it was not necessary to consider whether the rule, that a carrier has no right to waive a provision in a contract for interstate transportation, which is filed with its tariff schedules, requiring a notice in writing within a certain time, applies to a similar provision in a contract for intrastate transportation, which has been filed in a like manner. *Ibid*.
- Whether a warranty of quality of oats sold had been waived by the purchaser was held to be a question of fact to be determined by the jury. *Cavanaugh v. D. W. Ranlet Co.* 366.
- Waiver of defence in action at law, see appropriate subtitle under PRACTICE, CIVIL.
- Of right given by statute, see subtitle under PRACTICE, CIVIL.

WARRANTY.

See SALE.

WATERCOURSE.

- Superintendent of streets of a town in placing in the street catch basins and gratings without any vote of the town for the purpose of diverting surface water from a public street into a culvert was held to act as a public officer so that the town was not liable for damage caused by the overflowing of a brook upon the land of a private owner caused thereby. *Blaisdell v. Stoneham*, 563.

WAY.

Private.

- A grant of a private right of way cannot be created by implication from the words of a deed or indenture or from the conjectured wishes of the parties where the easement is not conveyed by words of grant and inheritance. *Apsey v. Nash*, 77.
- Where, twenty-seven years after the superintendent of streets of a town, acting under Gen. Sts. c. 43, § 83, (now R. L. c. 48, § 99,) for the public safety and to protect the town from liability for injuries, placed a barrier across the entrance to a private way fifty feet wide, leading from a public street to a pond which belonged, as an easement granted by deed, to the owner of certain land, the town acquired by purchase and conveyance the land to which the right of way was appurtenant, it was held that it acquired the right to use the private way over its full width for vehicles as well as for travellers on foot. *Brookline v. Whidden*, 485.

Way (*continued*).

Acts of the superintendent of streets of a town, which, as the owner of certain land owned as appurtenant to it an easement of the right to use a private way fifty feet wide and had brought a suit in equity for a mandatory injunction to compel the removal of a substantial brick wall built nineteen feet into such private way, and of a member of the board of selectmen having in charge the highway district that includes the right of way, which were held to be no defence because these acts did not constitute a license by the town to interfere with the easement owned by it, which could not be relinquished nor extinguished by an act of any town officer not authorized by the town. *Brookline v. Whidden*, 485.

In the same cases it was held that the defendants under the circumstances must be taken to have made expenditures without excuse and under no misapprehension; and that, there being no suggestion that prompt action had not been taken when the matter came to the attention of the proper officers of the town, mandatory injunctions should issue ordering the defendants to remove the obstructions. *Ibid*.

Public.

Violation by the owner of real estate adjoining a public way of an ordinance requiring him to keep the sidewalk adjoining his house free from snow and ice would not render him liable for personal injuries caused to a traveller who slipped upon ice there in the absence of evidence that negligence of such owner caused it to be there. *Sanborn v. McKeagney*, 300.

U. S. St. 1884, c. 9, relating to post routes, does not contravene the rule that the public ways laid out and maintained by the Commonwealth and its subdivisions can be altered or discontinued only by the authorities that laid them out and that such authorities also have the power of supervision and control inherent in the Commonwealth and can make and enforce reasonable regulations for the use of such public ways. *Commonwealth v. Closson*, 329.

A mail carrier, driving a horse attached to a mail wagon engaged in distributing the United States mail on a public highway or on a public park way, is subject to the rules and regulations made respectively by the street commissioners and the park commissioners requiring a traveller to drive on the right hand side of a road and in turning to the left into another street to pass to the right of and beyond the centre of the intersecting street before turning. *Ibid*.

Certain regulations by street commissioners and park commissioners as to use of highways were held to be reasonable and constitutional and their violation punishable as a criminal offence. *Ibid*.

Non-liability of town for personal injuries of a traveller upon a highway upon crutches, whose crutch slipped through the cover of a drain. *Delamaine v. Revere*, 403.

WILL.

Officers of a trust company which was named as executor of the will of a woman and which previously had been trustee of property of hers amounting substantially to \$100,000 which it was bound "to transfer, convey and pay over . . . to her executors or administrators" were held not to be dis-

qualified as attesting witness to her will. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

In the same case it was said that the fact that the subscribing witnesses were the servants of the trust company named as executor and acted at the request of the trust company did not make the attestation of the will the act of the trust company itself. *Ibid.*

Upon the issue of the soundness of mind of an alleged testatrix, an exclusion by the presiding judge as evidence of a certified copy of a decree of the Probate Court appointing a guardian for an uncle of the testatrix as "an insane person, and incapable of taking care of himself," was held under the circumstances to have been a proper exercise of judicial discretion. *Ibid.*

In the same case a physician, who was not an expert in mental diseases and who had attended the late husband of the testatrix in his last illness, had never had attended the testatrix professionally, was asked, "In your opinion what was her mental development, I mean the maturity of her mind?" and it was held that the answer properly was excluded as calling for opinion. *Ibid.*

In the same case it was said that, if the counsel for the contestant did not wish to abide by the ruling of the judge excluding the question quoted above, he should have made it plain to the judge that the question called for a statement of the facts observed by the witness and not for the witness's opinion, and that, not having done this, it was not open to the contestant to contend that the question did not call for an expression of opinion as it purported to do. *Ibid.*

In the same case it was held justifiable for the judge to refuse to allow a cousin of the testatrix to testify that the witness's mother, long since dead, had told her between fifty and sixty years ago that a brother of her father, who was also an uncle of the testatrix, shot himself and committed suicide about 1836. *Ibid.*

Upon the trial of the issue whether undue influence was exercised upon an alleged testatrix, the presiding judge in his charge erroneously instructed the jury that "the burden is upon the contestants to show that the established facts are inconsistent with any theory but that of the theory of undue influence," but his instructions as a whole made it plain that the jury were instructed correctly that the burden was not upon the executor to establish the negative of undue influence but was upon the contestants to show affirmatively the existence of undue influence by a fair preponderance of the evidence, and it was held that there was no error of substance sufficient to sustain an exception. *Ibid.*

Construction of wills, see DEVISE AND LEGACY.

WITNESS.

Subscribing Witness to Will.

Officers of a trust company which was named as executor of the will of a woman and which previously had been trustee of property of hers amounting substantially to \$100,000 which it was bound "to transfer, convey and pay over . . . to her executors or administrators" were held not to be disqualified as attesting witnesses to her will. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

In the same case it was said that the fact that the subscribing witnesses were

Witness (*continued*).

the servants of the trust company named as executor and acted at the request of the trust company did not make the attestation of the will the act of the trust company itself. *Boston Safe Deposit & Trust Co. v. Bacon*, 585.

Expert.

See appropriate subtitle under EVIDENCE.

Credibility.

In an action by an employee of an independent contractor for the construction of a building against the general contractor, the plaintiff called the defendant as a witness, and he on his direct examination made a statement that all the persons who worked on the building did so under his direction, but, it being plain that he was referring to the subcontractors and not to the men in their employ, it was held that this was no evidence that he was responsible for the injury. *Kettleman v. Atkins*, 89.

In the case stated above it was pointed out that the conclusion reached in regard to the defendant's testimony was not at variance with the well established rule that if a witness in testifying makes inconsistent statements the jury may believe some of the statements and disregard others, because the defendant's statements understood in their obvious meaning were not inconsistent. *Ibid*.

Where a witness for a party to an action has testified that he was in the employ of that party when the events to which he has testified occurred, it is right for the presiding judge to instruct the jury that they may consider the fact that the witness was in the employ of the party at the time referred to in determining the degree of credibility to be given to his testimony. *Mikkelsen v. Connolly*, 360.

It was held that, although it would have been a wiser exercise of discretion by the presiding judge to have excluded a question tending to bring out the fact that an expert engineer, called as a witness by the plaintiff, had been employed by the defendant as an expert in engineering, yet the evidence was not strictly incompetent and its admission was not reversible error. *Harrington v. Boston Elevated Railway*, 421.

Cross-examination.

Upon the cross-examination as a witness of one of the parties to an action at law the exclusion of questions which properly may be regarded as immaterial and as having a tendency to raise collateral issues is within the discretionary power of the presiding judge. *Kumin v. Fine*, 75.

The exclusion of evidence, offered on the cross-examination of a witness for the purpose of showing bias, is within the discretionary power of the presiding judge, which in the present case was exercised properly. *Gavin v. Durden Coleman Lumber Co.* 576.

Failure to Call.

The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him. *Little v. Massachusetts Northeastern Street Railway*, 244.

Application of the foregoing principle in an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate by reason of the carriage in which he was driving being overturned when the defendant's motorman, as the plaintiff alleged, sounded the whistle on his car as he was opposite the carriage and the horses were frightened, where the motorman was available but was called by neither party and the judge left it to the jury to determine what inference, if any, was to be drawn in favor of, or against, either party, from the failure to call the motorman as a witness. *Little v. Massachusetts Northeastern Street Railway*, 244.

On the evidence at the trial of an action of tort for the alleged wrongful taking of certain household furniture under the claim of a mortgage which the plaintiff contended had been paid and discharged, where the evidence showed that the defendant employed a certain expressman to go to the plaintiff's house and remove the furniture, instructions by the presiding judge permitting the jury to infer that the testimony of the men employed by this expressman who took the furniture away, if they had been produced as witnesses, would have been unfavorable to the contention of the defendant, were held in this respect to have been erroneous because under the circumstances shown no inference properly could have been drawn from the failure to call these witnesses that their testimony, if given, would have been favorable to the contention of either party. *Mickelson v. Connolly*, 360.

WORDS.

- "Any person or kindred." See *Treasurer & Receiver General v. Sermini*, 248, 252.
- "Arrival." See *Cavanaugh v. D. W. Ranlet Co.* 366, 372.
- "Assessment day." See *Kimball v. Cotting*, 541, 542, 543.
- "Average weekly wages." See *Rice's Case*, 325, 328.
- "Debt." See *Digney v. Blanchard*, 235, 237.
- "Dependents." See *McMahon's Case*, 48, 50.
- "For." See *Codman v. American Piano Co.* 285, 291.
- "Furnish." See *Ripley's Case*, 302, 304.
- "In respect of." See *Codman v. American Piano Co.* 285, 291.
- "Issue." See *Manning v. Manning*, 527, 529, 532.
- "New assets." See *Shattuck v. Burrage*, 448, 450, 453.
- "Office furniture." See *Crocker v. Malden*, 313, 314.
- "On." See *Codman v. American Piano Co.* 285, 291.
- "On this condition." See *Amory v. Harvard College*, 374, 383.
- "Operated." See *Commonwealth v. Henry*, 19, 21, 22.
- "Other taxes or excises." See *Kimball v. Cotting*, 541, 544.
- "Since deceased." See *Faulkner v. Tax Commissioner*, 120, 121.
- "Their issue." See *Manning v. Manning*, 527, 530, 532.
- "Then." See *Hall v. Farmer*, 103, 104, 105.

WORKMEN'S COMPENSATION ACT.

Election of Remedy.

In an action by an employee of a firm of masons against the members of a firm of teamsters for personal injuries alleged to have been sustained by

reason of the negligence of a driver of the defendants, it was held that certain evidence as to treatment of the plaintiff at a hospital which his employer had selected under the workmen's compensation act for treatment of its employees would not warrant a finding that the plaintiff had elected to accept the benefits of the workmen's compensation act. *Wahlberg v. Bowen*, 335.

Procedure.

Deposition.

An oral application by the Industrial Accident Board and the filing of interrogatories by the secretary of the board for the taking of a deposition are not a written request for a commission within the meaning of St. 1915, c. 275. *Derinza's Case*, 435.

The words of the statute providing that a commission shall issue "upon the written request of the board or of any member thereof" mean that the application actually must be signed by the board or by some member of the board, and a written request by the secretary of the board cannot be held to be the request required. *Ibid.*

It seems that if such a commission to take the deposition of a witness in a foreign country is issued through inadvertence when by mistake or oversight no written request has been filed, the defect can be cured by the filing of a written request by the board or some member of it and the allowance of that request by the Superior Court by a *nunc pro tunc* order. *Ibid.*

An objection by the insurer to a deposition upon such ground is an objection to the form of the deposition and cannot be taken for the first time when the deposition is offered in evidence at the hearing before the Industrial Accident Board, after the insurer has filed cross-interrogatories and the deposition has been taken in the foreign country and has been used without objection at the hearing before the arbitration committee. *Ibid.*

When a commission was issued for taking the deposition in a foreign country of the alleged dependent widow of a deceased injured employee in a claim under the workmen's compensation act, it was held that under the circumstances there was no impropriety in the preparation of interrogatories to be propounded to such widow by the clerk of the Industrial Accident Board "in behalf of" the claimant and acting for an arbitration committee which has been formed to hear the case. *Ibid.*

In regard to the same deposition it was held that there was nothing in an objection to the admission of the deposition on the ground that it did not appear that the deponent could be punished for perjury in the place where it was taken, the commission being in the usual form and directed to a consular officer of the United States accredited to a civilized nation. *Ibid.*

In regard to the same deposition it was pointed out that one of the interrogatories, which was objectionable in form but was answered properly, doubtless would have been expressed in the proper manner if the objection to its form had been made when the interrogatories were filed. *Ibid.*

Evidence.

In a claim under the workmen's compensation act error in admitting incompetent evidence of the marriage of the deceased employee and of the births of his children in alleged copies of certificates was held to have been harmless because the widow of the deceased employee in her deposition testified

to the fact of her marriage with the deceased and to the birth of their three children and their ages, and this testimony was uncontradicted. *Derinza's Case*, 435.

Objection, raised for the first time in this court, to consideration by the Industrial Accident Board of the value of an Italian lira in United States money without proof, which if it had been raised at the proper time easily could have been met by the introduction of the required evidence, was held not to be open to the insurer. *Ibid*.

Decree.

It was said that, in a claim where there are a widow and minor children wholly or in part dependent, the decree should be of easy comprehension and ought to contain a clause stating expressly that under the terms of the act the payment to the widow is to cease in case of her death before the expiration of the period of payment. *Derinza's Case*, 435.

Appeal.

In a claim under the workmen's compensation act, error in admitting incompetent evidence of the marriage of the deceased employee and of the births of his children in alleged copies of certificates was held to have been harmless because the widow of the deceased employee in her deposition testified to the fact of her marriage with the deceased and to the birth of their three children and their ages, and this testimony was uncontradicted. *Derinza's Case*, 435.

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Persons to whom Act applies.

The circumstances of the hiring of a journeyman paper hanger by the foreman of the wall paper department of a corporation conducting a department store were held to warrant a finding, upon a claim by him under the workmen's compensation act for compensation for an injury sustained in the course of his work by a fall from a step-ladder, that at the time of his injury he was in the employ of the corporation and was not an independent contractor within the meaning of St. 1911, c. 751, Part III, § 17. *McAllister's Case*, 193.

Girl sixteen years of age working at weaving in a mill as a "spare time worker," working all her spare time after school, was held under the circumstances to be entitled to compensation on the basis of the "average weekly wages" earned by her during the time she actually was employed, and not to be deprived of compensation merely because her average weekly wages cannot be computed in any of the ways provided for in St. 1911, c. 751, Part V, § 2. *Rice's Case*, 325.

Injuries to which Act applies.

Dependent widow of an employee of a city that had accepted St. 1913, c. 807, who was injured while upon a steam roller hired by the city for

Workmen's Compensation Act (*continued*).

work on its highways, its owner furnishing the "engineer, coal, wood and steam," was held not to be entitled to claim compensation under the workmen's compensation act, because the injuries that caused the death of the employee did not arise out of or in the course of his employment. *O'Toole's Case*, 165.

On the evidence in support of a claim of the dependents of a door-tender of the cooling room of a pork packer who was killed from drinking muriatic acid from a bottle which he supposed contained water and which he kept under a sink without the knowledge of his employer, it was held that a finding was warranted that the death of the employee resulted from an injury arising out of and in the course of his employment. *Osterbrink's Case*, 407.

The death of an employee, which was caused by overheating occasioned by unusually hard labor performed after the end of the ordinary work of the day and in a close and overheated atmosphere, may be found to have resulted from an injury covered by insurance under the workmen's compensation act. *Mooradjian's Case*, 521.

An injury to a teamster who was sent with a team by his employer to transport for a contractor, who was a subscriber under the workmen's compensation act, concrete window sills and tools for the constructing of a garage, resulting from having one of the concrete window sills slip and fall upon him as he was assisting in loading it on his team at the contractor's yard, was held to be within the provision of St. 1911, c. 751, Part III, § 17, entitling an employee of a subcontractor to compensation under the act. *Comerford's Case*, 573.

In a claim under the workmen's compensation act it was held that on the evidence reported a finding of the Industrial Accident Board, that the death of an employee from tuberculosis was not caused nor accelerated by an injury to his foot a year and five months earlier, was warranted. *Walsh's Case*, 599.

Dependency.

In a claim under the workmen's compensation act by the father of a deceased injured employee a finding that the father was partly dependent was held to have been warranted where it appeared that the son contributed \$5 per week to the support of a family of eight, three of whom worked, and also worked and brought things home to the members of the family. *McMahon's Case*, 48.

But in the same case, the including of certain saving's bank accounts, which the employee had intended to devote in accordance with a promise to his mother toward the payment of the cost of a contemplated addition to the family house, in computing under St. 1911, c. 751, Part II, § 6, the amount which the father should receive as the next of kin partly dependent upon the earnings of the deceased employee for support, was held to have been erroneous. *Ibid.*

In a claim by dependent next of kin, it was held that there was no error in ordering the insurer to pay to the two surviving partly dependent daughters of the deceased employee equal sums of money, there having been ample evidence to support the findings as to the partial dependency of each of the daughters upon the money which was contributed each week by the de-

ceased employee to the family fund for the support of the family. *Osterbrink's Case*, 407.

Non-resident aliens, domiciled in the country of a friendly nation, who are dependent for support upon the earnings of a deceased injured employee insured under the provisions of the workmen's compensation act, are entitled to the benefits of the provisions of that act. *Derinza's Case*, 435.

Finding by the Industrial Accident Board of total dependency of the widow of an employee, resident in Italy, was held not to have been warranted by the evidence, and a further hearing was ordered before the Industrial Accident Board in which the claimant should be allowed to introduce further evidence and the insurer should have the same privilege. *Ibid*.

In the same claim the board found as a fact that the three children of the deceased employee also were wholly dependent, and it was held that there should be a further hearing on this question also. *Ibid*.

Under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 7 (a), that a wife shall be presumed to have been wholly dependent for support "upon a husband with whom she lives at the time of his death," the living together of husband and wife imports actual enjoyment of the marriage relation under a common roof and cannot include prolonged absences, even though one of the two remains at home and the other expects to return. *McDonald's Case*, 454.

Where such physical separation has been continued for more than a year for reasons of mere business expediency, it cannot be found that a wife who stayed at their home in Nova Scotia was living with her husband, who was employed in this Commonwealth, at the time of his death. *Ibid*.

In a claim under the workmen's compensation act by the alleged dependent widow of a deceased employee, where it appears that the wife and five minor children of the employee lived in Nova Scotia in a house belonging to the wife, which was in good repair and had eight rooms in it, it cannot be found that the wife was wholly dependent for support upon her deceased husband. *Ibid*.

Nor can it be found in the case stated above that the minor children of the employee were wholly dependent upon him for support. *Ibid*.

Upon the claim of the alleged dependent widow of a deceased employee who had remained in Armenia while her husband worked here for three and a half years, it cannot be found that the wife was living with him at the time of his death. *Mooradjian's Case*, 521.

Therefore under St. 1911, c. 751, Part II, § 7, she is not presumed conclusively to have been wholly dependent upon his earnings for support and the question of her dependency must "be determined in accordance with the fact" as it was at the time of her husband's injury. *Ibid*.

One who was dependent upon the earnings of a deceased employee for support at the time of his death is not debarred from receiving compensation under the workmen's compensation act by reason of residence in a friendly foreign country. *Ibid*.

Amount of Compensation.

Girl sixteen years of age, working at weaving in a mill as a "spare time worker," working all her spare time after school, was held under the circumstances to be entitled to compensation on the basis of the "average

weekly wages" earned by her during the time she actually was employed, and not to be deprived of compensation merely because her average weekly wages cannot be computed in any of the ways provided for in St. 1911, c. 751, Part V, § 2. *Rice's Case*, 325.

Expenses for Physician and Hospital.

The requirement of the workmen's compensation act contained in St. 1914, c. 708, § 1, that for the first two weeks after an injury to an employee the insurer "shall furnish reasonable medical and hospital services," is not complied with by having posted notices in the employee's place of work to the effect that he could be treated for injuries at a certain hospital, without having made arrangements with that hospital for such services and without having done anything more after the employee's injury than to direct him to go to that hospital. *Ripley's Case*, 302.

Evidence in the case where the point above stated was decided, although it would have supported a finding by inference that arrangements for the treatment of employees at a hospital had been made, did not require such an inference as matter of law, so that a finding by the Industrial Accident Board that there was no evidence that any arrangements had been made to furnish treatment was warranted. *Ibid*.

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